IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3875 of 2003

to

SPECIAL CIVIL APPLICATIONNo 4399 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? Labour Courts and IndustrialTribunals : YES

STATE OF GUJARAT

Versus

MANIBEN VIRAJI

Appearance:

1. Special Civil Application No. 3875 of 2003
to SPECIAL CIVIL APPLICATIONNo 4399 of 2003 :
Mr. A.D. Oza, GP and Mr. H.D. Dave, AGP
for Petitioner No. 1
..... for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 09/04/2003

ORAL JUDGEMENT

These petitions have been filed by the petitioner State of Gujarat challenging two common awards passed by the Labour Court, Surat under Article 227 of the Constitution of India.

Heard Mr. A.D.Oza for the petitioners in this group of petitions. The Labour Court, Surat has passed two common award dated 13th June, 2002 one in Reference (LCS) No. 47 of 1999 to 51 of 1999, 15 of 1999 to 84 of 1999, 146 of 1999 to 151 of 1999, 186 of 1999 to 361 of 1999. The Labour Court, Surat has also passed second common award of the same date in Reference No. 205 of 1995 to 622 of 1995. In both the common awards, the labour court, Surat has granted the same and similar benefits as well as issued some similar directions in favour of the respondent workmen. The labour court, Surat has directed the second party respondent workmen to submit detailed residential address, ration card and the election card or any other Government documents along with the certificate of birth date to the Executive Engineer (4) Division-1 at Ukai, Taluka : Songadh, District Surat. The labour Court, Surat has also directed the first party State to prepare the seniority list of the part of the workmen covered by these two common awards who have not yet crossed the upper age limit and there is no bar of age as per their birth date, for reinstating them a fresh in service on their original post. The labour court, Surat has also directed the first party establishment to give work to the workmen covered by these two common awards (whose name and number have been mentioned in the Schedule-A forming part and parcel of the said common awards) as per the said seniority list on the posts which have been sanctioned but are vacant at present wherein the Government has granted approval for filling up such posts. Under the said two common awards, it has also been clarified by the labour court that the workmen covered by the said two common awards have not to be given any benefit of back wages for the intervening period or continuity of service. The labour court has also directed to complete the procedure within 120 days from the date of publication of the award by publishing such seniority list of the workmen covered by these two common awards and to provide them work in accordance with the aforesaid

directions. The schedule A to the said common awards has been ordered to be treated as a part and parcel of the awards.

Considering these two common awards, according to the petitioner, it comes to total 525 respondent workmen. In respect of reference No. 205 of 1995, there are total 244 male workmen and 110 female workmen, total of which would come to 354 workmen. In respect of reference No.47 of 1995, there are 99 male workmen and 72 female workmen, total of which would come to 171 and the total of these two references would, thus, come to 525 [354 workmen plus 171 workmen] whose list has been annexed by the labour court along with the said two common award as Schedule-A and which has been treated to be the part and parcel of the said two common awards. Before dealing with the matters on merits, it would be just and proper to refer to the observations made by the apex court in case of M.S. Garewal versus Deep Chand Sood and others reported in 2001 (8) SCC page 151. In para 27 and 28 of the said decision, the apex court has observed as under:

"27. The decision of this Court in D.K.Basu versus State of W.B. comes next. This decision has opened up a new vista in the jurisprudence of the country. The old doctrine of only relegating the aggrieved to the remedies available in civil law limits stands extended since Anand,J. (as His Lordship then was) in no uncertain terms observed; (SCC p. 439 para 45)

'The Courts have the obligations to satisfy the social aspirations of the citizens because the Courts and the law are for the people and expected to respond to their aspirations. A Court of law cannot close its consciousness and aliveness to stark realities. Mere punishment of the offender cannot give much solace to the family of the victim civil action for damages is a long drawn and a cumbersome judicial process. Monetary compensation for redressal by the court finding the infringement of the indefeasible right to the life of the citizen is, therefore, useful and at times perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim,who may have been the breadwinner of the family.'

28. Currently, judicial attitude has taken a shift from the old draconian concept and the traditional jurisprudential system - affection of the people has been taken note of rather seriously and the judicial concern thus stands on a footing to provide expeditious relief to an individual when needed rather than taking recourse to the old conservative doctrine of the civil court's obligation to award damages. As a matter of fact, the decision in D.K. Basu has not only dealt with the issue in a manner apposite to the social need of the country but the learned Judge with his usual felicity of expression firmly established the current trend of justice oriented approach. Law courts will lose their efficacy if they cannot possibly respond to the need of the society technicalities there might be many but the justice oriented approach ought not to be thwarted on the basis of such technicality since technicality cannot and ought not to outweigh the course of justice."

It was submitted by the learned G.P. Mr.Oza that the respondents workmen were given work by the petitioner on construction of Ukai Dam between 1972 to 1979. In all, about 10000 workmen were given work as a daily wager. Work of Ukai Dam was over and completed in the year 1980 but the canal work had continued upto 1986 and, thereafter, it also came to an end. According to the learned Government Pleader Mr. Oza, the services of the respondent workmen were terminated in the year 1980 and out of this group, some of them have already left the job in the year 1977-78. He, therefore, submitted that the termination of the respondent workman of the year 1977 or 1978 or 1980 has been challenged by the concerned workmen after the period of about fifteen to sixteen years under the machinery of the Industrial Disputes Act, 1947 by raising the industrial disputes which were referred to for adjudication by the concerned Assistant Commissioner of Labour by order dated 19th July,1996 and in another group, such disputes were referred to for adjudication on 13th February, 1999. Thus, it was his submission that the disputes raised by the respondent workmen under the machinery of the I.D. Act, 1947 were belated, suffering from the vice of delay, laches and delay on their face itself and, therefore, it was submitted by him that the awards made by the labour court after adjudication on merits are illegal, erroneous and the same are required to be quashed and set aside.

The next contention raised by Mr. Oza, learned G.P. is that the petitioner herein is not an industry within the meaning of section 2(j) of the Industrial Disputes Act, 1947. It was specifically submitted by him that the petitioner, irrigation department of the State of Gujarat is not an industry within the meaning of the said section. It was his submission before this Court that such contention raised by the petitioner before the labour court has not been considered by the labour court and the references have been adjudicated without deciding it and the awards have been passed and, therefore, there is an apparent error on the part of the labour court in making the awards in question.

The third contention raised by Mr.Oza is to the effect that looking to the direction No.3 issued by the labour court, the labour court has directed to appoint the respondent workmen against the cadre which posts have been created by the petitioner according to the seniority of the respondent workmen. It was his submission that the labour court has no jurisdiction to direct the petitioner to appoint the respondent on any permanent post or cadre and the labour court has no jurisdiction to grant better position while deciding the order of termination. He submitted that at the most, the labour court can restore the original situation while setting aside the order of termination but cannot grant better benefit in a reference wherein the order of termination is under challenge. Therefore, it was his submission that the directions issued by the labour court are contrary to law and settled position of law and, therefore, the awards in question are required to be quashed and set aside by this court. He also submitted that in all, there were more than 10,000 workmen engaged by the petitioner at the relevant time and the petitioner being an authority of the State, is required to consider the claim of all such other employees who are similarly situated irrespective of the fact whether they have approached the labour court or not. He also submitted that all the respondent workmen were engaged by the petitioner as a daily wager for a particular project and when the project work would come to an end, then, their services would automatically come to an end and in such a situation, the labour court has no jurisdiction to grant the reinstatement to such respondents workmen.

In support of his submissions, learned Government Pleader Mr. Oza has placed reliance on the decision in Shankarji Chelaji Thakor versus State of Gujarat, 2000 (1) GLH page 482 and has submitted that in the said decision, the Division Bench of this Court has, after

considering three decisions of the Apex Court, one in the case of Executive Engineer (State of Karnataka) versus K. Somasetty reported in 1997 AIR SCW 2627 and the other in the case of Union of India versus Jai Naraayan Singh, 1995 Supp. (4) SCC 672 and the third in the case of State of H.P. versus Suresh Kumar Verma reported in (1996) 2 JT SC 455, held the function of public welfare of State is a sovereign function and under the circumstances, State is not an industry. He further submitted that it has been held in the said decision by the Division Bench of this Court that it is the constitutional mandate under the Directive Principles that the Government should bring about welfare State by all executives and legislative actions, under the circumstances, the State is not an industry under the I.D. Act; even otherwise, since the project has been closed, the respondent has no right to the post since he had been appointed on daily wages.

He has also placed reliance on the decision in the matter of Madhyamik Shiksha Parishad, UP versus Anil Kumar Mishra and others reported in AIR 1994 SC 1638 and has submitted that in the said matter, casual workmen were working temporarily under the State Government and the posts were not sanctioned and it has been observed by the apex court in the said decision that the completion of 240 days of work by such workmen cannot attribute status of casual workmen to them.

He has also submitted that in the matter of in the case of Executive Engineer (State of Karnataka) versus K. Somasetty reported in 1997 AIR SCW 2627, the apex court has observed that the function of public welfare of State is a sovereign function and under the circumstances, State is not an industry; that it is the constitutional mandate under the Directive Principles that the Government should bring about welfare State by all executives and legislative actions, under the circumstances, the State is not an industry under the I.D. Act; even otherwise, since the project has been closed, the respondent has no right to the post since he had been appointed on daily wages. He also submitted that the apex court has considered two decision one in case of Union of India versus Jay Narayansinh reported in 1995 (Supp) 4 SCC 672 and the State of HP versus Suresh Kumar Verma (1996) 2 JT SC 455 wherein it has been held that the irrigation department and the tele communication department are not an industry within the meaning of the definition under the I.D. Act.

Mr.Oza has also submitted that in case of State

of Himachal Pradesh versus Suresh Kumar Verma and another, reported in AIR 1996 SC 1565, the apex court has observed that the appointment on daily wage basis is not an appointment to the post according to the rules and the directions to reengage them in any other work or appoint them against existing vacancies cannot be given by the Court in view of the termination of daily wage employees due to coming to end of the project employing them.

Learned GP Mr. Oza has also relied upon some unreported decisions of this court. One decision is in case of State of Gujarat versus Babu Balu in Special Civil Application No. 9351 of 2001 to 9360 of 2001 dated 10th December, 2001 and has submitted that in the said decision, this Court (Coram : M.S.Shah, J.) has after considering the decision of the apex court in the case of State of Gujarat v. Pratamsingh Narsinh Parmar, JT (2001) 3 SC 326, held that the forest department of the State of Gujarat is not an industry within the meaning of section 2(j) of the I.D. Act. Relying upon the aforesaid decision, he submitted that in this case also, considering the function of public welfare carried out by the irrigation department, the labour court ought to have decided that issue and ought to have held that the irrigation department of the State Government is not an industry within the meaning of Sec.. 2(j) of the I.D. Act, 1947.

He has also relied upon the decision in case of Rabari Hathiya Veja versus State of Gujarat in Misc. Civil Application No. 625 of 2002 in Special Civil Application No. 9338 of 2001 to Misc. Civil Application No. 643 of 2002 dated 1st August, 2002 and has submitted that in the said decision, this Court (Coram : M.S.Shah,J.) has examined the same question and ultimately, has held that the forest department of the State of Gujarat is not an industry within the meaning of sec.2(j) of the I.D.Act is a settled law.

He also submitted that the same question has also been examined by the Division Bench of this Court in Letters Patent Appeal No. 1557 of 2001 dated 23.12.2002 and it has been held by the Division Bench of this Court that the point whether the forest department is an industry or not is concluded in view of the decision of the apex court that the forest department is not an industry and ultimately, the appeal filed by the workman was dismissed by the division bench of this Court.

Relying upon the aforesaid decisions, learned GP Mr. Oza has submitted that similarly, irrigation

department is also not an industry and such contention raised by the petitioner before the labour court has not been considered and examined by the labour court and, therefore, award without examining that aspect of the matter is required to be quashed and set aside. Except the aforesaid contentions, no other contentions have been raised by the learned Government Pleader Mr. Oza on behalf of the petitioner in this group of petitions.

I have considered the submissions made by the learned GP Mr. Oza. I have also considered the decisions cited by the learned GP Mr. Oza. Before dealing with the submissions made by the learned GP Mr. Oza, I am of the opinion that the facts of the case before the labour court are required to be examined and taken into account.

Before the labour Court, on behalf of the respondents workmen, statement of claim were filed wherein it was narrated by the respondents workmen that they were engaged in the construction of canal and dam and they were required to work digging, excavation, repairing and construction of Nala and other allied work which is related to canal and dam and they were required to work eight hours in a day and they were in continuous service and the Industrial Disputes Act, 1947 is applicable to the petitioner. It has also been asserted that the other persons were recruited on muster and the petitioner was maintaining attendance register but they were not being paid the minimum wages by the petitioner and ultimately, their services were terminated by the petitioner without following the mandatory provisions of the Industrial Disputes Act,1947. The labour court after filing of the statement of claim by the respondents workman, issued notices to the petitioner first party. The Labour court was also having the record of the conciliation officer. Before referring the dispute, there were conciliation proceedings before the conciliation officer between the parties. Before the conciliation officer in the conciliation proceedings, the respondent workmen had filed separate applications with a prayer to condone the delay in raising the industrial dispute along with an application for condonation of delay in raising the industrial dispute. On the basis of the submissions made by both the parties before the conciliation officer and considering the affidavit and application of the respondents workmen, the conciliation officer has come to the conclusion that whatever delay has been occurred in raising the industrial dispute has been condoned and the conciliation proceedings have been initiated under the provisions of the I.D.Act,1947.

Before the labour court, separate statement of claim were filed by the respondent workmen in each reference having similar facts. Thereafter, references were consolidated before the labour court on the basis of the application submitted by the respondent workman in view of the no objection from the petitioner side. Common replies were filed by the petitioner in the references before the labour court wherein it has been contended that the reference is bad, the labour court is having no jurisdiction, it is contrary to the principles of natural justice, the reference is barred by the misjoinder of parties. The petitioner has also disputed the date of engagement and termination of the respondent workman as alleged. They also disputed that there is any cause of action as alleged. However, it was submitted by them that there was construction of Ukai Dam and canal to provide water to the farmers. This water was being provided to the farmers by charging necessary amount from each farmer meaning thereby, they were providing the water and other facilities by charging the amount to the farmers and other industries or any other persons. In short, in its common written statements filed before the labour Court, the petitioner has disputed all the statements made by the workmen in their statements of claim. In their written statement, they admitted certain facts that the workmen were recruited or engaged in construction work and dam canal in the year 1977 and thereafter, some of the workmen left job at their own and services of some workmen were terminated by the petitioner. It has also been contended that there was delay in raising the dispute and the work of canal and dam of Ukai has already become over long ago and, therefore, references made at the instance of the workmen are required to be rejected. Thus, from perusal of the whole written statement, the petitioner has nowhere contended that the irrigation department is not an industry and, therefore, provisions of the Industrial Disputes Act, 1947 are not applicable. Thus, in its written statements, save and except the denial of factual aspects and bar of limitation in raising disputes, no other contention has been raised by the petitioner.

Before the labour court, it was decided between the parties to file affidavits of each workmen and the petitioner advocate agreed to that and ultimately, the labour court granted said request to file separate affidavit of each workman and thereafter, on behalf of the respondents workmen, details were given on affidavit about the name of the workman, date of his/her engagement, total years of service put in, department, designation, daily wage, date of termination. Those

affidavits were at Exh. 30 to 201. Out of that, some of the workmen were examined by the petitioner. Looking to the award in Reference no. 47 of 1999, affidavit of each workmen were on record produced by the respondent vide at Exh.30 to 201. The petitioner's advocate before the labour court had examined the workman Maniben V. Gamit at Exh.30, Mamta Gamit at Exh. 53, Rangji at Exh. 63 and Vajesinh M.Gamit at Exh. 107. Similarly in reference No.205 of 1995, one workman Sureshbhai was examined and cross examined vide Exh. 25. In both the reference, on behalf of the petitioner, certain documents were produced. After closure of the oral evidence of the workmen in respect of reference no. 205 of 1995, on behalf of the petitioner, one witness Rasiklal B. Shah was examined at Exh.95, one Kishanbhai M. Dalal was examined at Exh. 99 and one Lallu R. Chaudhary was examined vide Exh. 100;one witness Ambalal H. Patel was examined vide Exh. 107. The workmen produced their affidavit as directed by the labour court and out of all the workmen, some of them were cross examined as a sample by the petitioner as agreed between the parties. Witness for the petitioner were cross examined by the representative of the respondents workmen.

In Reference No. 47 of 1999, one witness Naresh Naginbhai was examined at Exh. 553 on behalf of the petitioner and his evidence was cross examined by the representative for the respondents and, thereafter, parties filed their purshis closing the evidence and thereafter submissions were made before the labour court on the merits of the matter.

Before considering the merits of the matter, it is necessary to be noted that while leading the evidence before the labour court in both the group of references, none of the witness for the petitioner has raised the contention that the petitioner being the irrigation department of the State, is not an industry within the meaning of section 2(j) of the Industrial Disputes Act, 1947. No details were given as to what type of work is required to be carried out by the irrigation department. No such contention has positively been raised by the petitioner in its written statement also. Therefore, in absence of such contention raised during the course of oral evidence or in the written statement, the only contention for consideration of the labour court was that the references referred for adjudication by the concerned conciliation officer are delayed and stale. Therefore, ultimately, the labour court, after considering the submissions made by the learned advocates for the parties, framed issue as to whether the delay in raising

of an industrial dispute could be condoned or not The second issue raised by the labour court was to the effect as to whether the concerned workmen covered by these two references are having eligibility for being reinstated and to get the back wages for the intervening period or not. Issue No.1 as regards was answered in the affirmative and the issue no.2 was answered partly in the affirmative.

The labour court has given reasons in support of its conclusion. The labour court has made reference of each and every document and the witnesses from both the sides and after appreciation of the evidence, both documentary and oral, considering the oral evidence of both the parties and the application of the workmen for condonation of delay and reply thereto vide Exh. 17 to 23 as well as the oral evidence which was led by the petitioner at Exh. 553, wherein also, no objection was raised and, therefore, considering these aspects of the matter, the labour court has come to the conclusion that the petitioner has not given any reasons as to why the delay should not be condoned. The labour court has considered the record of the conciliation officer. The labour court has also considered that looking to the disputes between the parties and considering the defence of the petitioner that there were relationship between the petitioner and the respondent workmen as employer and workmen, the labour court was of the opinion that the relationship between the parties was not disputed by the petitioner in its written statement. The labour court has also considered that the workmen are illiterate and scheduled tribe persons and, therefore, naturally, they were ignorant about the legal provisions to the effect that such dispute is required to be raised immediately or within some reasonable period. The labour court has also considered that there was some assurance given by the petitioner to the workmen that as and when the work will be available, they will engage the respondents workmen for such work. While considering the delay in raising of an industrial dispute, the labour court has also considered the decision of the apex court in the matter of Ajayabsing versus Sir Hind Coop. Marketing cum Processing Service Society Ltd.. and others reported in 1999 (82) FLR 137 (SC) as well as the decision in the matter of Masankumar Pandit versus Utter Pradesh Electricity Board reported in 2001 (90) FLR 754 (SC). I have also considered the said decisions. In the said decisions, it has been laid down by the Hon'ble apex court that no such specific period of limitation has been prescribed in the Industrial Disputes Act and it has been held by the apex court that in such circumstances, the

labour courts can take the decision as regards back wages in the manner thought proper by it. Considering the said decisions in light of the facts of the case before hand, the labour court was of the view that the delay in raising of an industrial dispute does not cease the dispute to exist and, therefore, the labour court was of the view that the delay in raising of an industrial dispute should be condoned. The Labour court has also considered that the respondents workmen were poor illiterate scheduled tribe persons ignorant of the law, unaware that such dispute has to be raised within reasonable period. Thus, considering the legal provision which does not provide any specific period of limitation for raising of such dispute and also considering the fact that the respondents are poor illiterate scheduled tribe persons unaware about the legal provisions and the assurance given by the establishment that as and when the work will be available, they will be given the work, and also considering the order of reference made by the conciliation officer which was not challenged by the petitioner before any higher forum, the labour court was of the view that the delay should be condoned and, therefore, it has condoned the delay and has examined the matter on merits. In view of the provisions contained in the Act which does not provide any specific period for raising such dispute, as per the law laid down by the apex court in the aforesaid two decisions, the labour court was of the view that such delay could be taken into account while granting relief in favour of the workmen and the reference cannot be rejected only on the ground of delay. Thus, it cannot be said that the labour court has granted the reliefs in favour of workmen without considering the delay aspect. Taking into consideration the delay aspect and other aspects of the matter, the labour court has declined to grant continuity of service and back wages for the intervening period.

While deciding issue no.2 as to whether the respondent workmen are entitled for being reinstated in service or not and if yes, whether they are eligible to get back wages for the intervening period or not. In their statements of claims filed before the labour court, it was alleged by the respondents workmen that they have been discharged by the first party establishment whereas it was the case of the first party establishment in its written statement filed before the labour court that the second parties workmen have abandoned the job at their own. The labour court has come to the conclusion that it is not a case of abandonment of service and the same has not been proved by the petitioner but it was a case of termination by the petitioner and, therefore, the workmen

have not left the job at their own. While deciding this aspect, the labour court has considered that the first party establishment has not asked any question about the abandonment of job at their own. After considering the oral evidence of the witness Vajesing Mathubhai Gamit at Exh.107, the labour court was of the view that presently also, work is going on at the site. Thus, after considering all these aspects of the matter, the labour court was of the view that it was a case of termination and not the abandonment of job at their own.

Thereafter, the labour court has examined as to whether the workmen have completed 240 days service as required under the Act or not. While examining this aspect, the labour court has considered the oral evidence of the witness for the petitioner establishment at Exh. 553 wherein the witness Shri Nareshkumar Naginbhai Patel has deposed on oath in his examination in chief that no record of Nominal Muster Roll for the period prior to 1974 is available with the establishment; such record for the period from 1965 to 1973 is also not available with the establishment; he is not having any information about the deputy engineer, executive engineer for the said period. The labour court has also considered that the witness was unable to depose as to whether the workman concerned namely Mamtaben had stopped to attend the work at her own or not because at that time, he was not present on the side. Thus, in light of the oral evidence of the witness for the petitioner establishment at Exh. 553, the labour court was of the view that it has not been proved from his oral evidence that it is not correct that the second party workmen were terminated; that the second party respondent workmen had left the service at their own for getting more financial gain from the other place; the work of canal construction etc. of the division wherein the workmen were engaged in service has been closed with effect from 20.8.1986.

Thereafter, the labour court has examined the oral evidence of the witness for the petitioner to examine whether the workmen have completed 240 days continuous service or not and has observed that none of the witnesses for the petitioner establishment were aware about the working days of the respondent workmen and was of the view that it has not been proved that the construction work of the canal has been closed with effect from 20.9.1986 as alleged by the petitioner. Considering the submission of the advocate representative for the petitioner, the labour court was of the view that the work which the workmen were performed has been performed by the new 450 workmen in construction of the

canal and dam. This admission has been made by the advocate Mr. Soni who was representing the petitioner establishment before the labour court. This would mean that the work which was performed by the respondents workmen is still going on and for that, newly recruited 450 workmen were engaged by the petitioner establishment and this fact has also been admitted by the witness for the petitioner in his evidence. After appreciating all these aspects and considering the oral and documentary evidence on record, the labour court was of the view that the petitioner establishment has not been able to disprove the facts narrated by the respondents workmen in their affidavits and, therefore, ultimately, the labour court has come to the conclusion that the respondents workmen have completed 240 days continuous service and since their services were terminated without giving any notice or notice pay in lieu thereof, there was breach of the mandatory provisions of section 25-F of the I.D. Act and in light of the evidence on record, the labour court was of the view that the order of termination is bad, void ab initio and contrary to the principles of natural justice. Inspite of such clear findings about the non compliance of the mandatory provisions of section 25-F of the I.D. Act, while granting the relief, the labour court has considered delay in raising of an industrial dispute and has granted such reliefs by taking into consideration delay in raising of such industrial dispute in both the common awards. These findings recorded by the labour court are based on the appreciation of the evidence on record and the learned Government Pleader Mr. A.D. Oza appearing for the petitioner has not been able to prove that they are contrary to evidence on record.

Now, I am considering the contention raised by the learned Government Pleader Mr. A.D. Oza before this court. It has been fairly accepted by the learned GP Mr. Oza that the petitioner has not raised specific contention before the labour court that the irrigation department is not an industry within the meaning of section 2(j) of the Industrial Disputes Act, 1947 and no oral evidence in that regard has been adduced before the labour court and no submissions have been made by the representative for the petitioner before the labour court. It was, however, his submission that the labour court ought to have taken into account the fact that the irrigation department is not an industry as held by the apex court and the labour court ought not to have entertained such reference relating to the irrigation department of the State. However, when asked by the Court, he has not been able to contend that in the conciliation proceedings before the conciliation officer,

petitioner establishment has contended that no reference should be made as the irrigation department is not an industry. It is a fact that such contention was not raised either before the conciliation officer or before the labour court that the irrigation department is not an industry. If it would have been raised, then, it would have certainly been examined by the Conciliation Officer and the Labour Court. I am of the view that the question as to whether the particular establishment is an industry or not within the meaning of section 2(j) of the I.D. Act, 1947 is the mixed question of law and facts for which oral and documentary evidence is necessary. What type of activities are carried out by the irrigation department is the relevant factor which is required to be proved by the petitioner before the labour Court that the activities of the irrigation department being the sovereign function or regal function of the State and, therefore, Industrial Disputes Act, 1947 is not applicable but from the record, it does not appear that any such contention has been raised by the petitioner before the labour court. In view of that, the labour court was having no material before it to consider such contention which was not raised before it. Another aspect is also required to be taken into consideration that if such contention would have been raised by the petitioner before the labour court that the irrigation department is not an industry within the meaning of section 2(j) of the Industrial Disputes Act, 1947, then, the respondent workmen would have got an opportunity to controvert such contention by leading proper evidence before the labour court and it would have been decided by the labour court on the basis of the material before it. In not raising such contention specifically and not making any submission during the course of submissions, the petitioner has deprived the other side from controverting such contention and the labour court too to consider it on merits on the basis of the material on record. However, this contention has been raised by the petitioner for the first time before this court. In such circumstances, whether the petitioner can be permitted to raise such contention for the first time before this court or not and whether the legality and validity of these two common awards could be examined on the basis of such contention or not is also a question.

In Special Civil Application No.7786 of 1997, benefits were claimed by the petitioner workman against the forest department which were granted by the learned Single Judge of this Court (Coram : D.C. Srivastava,J.) by order dated 10th August, 1999. This order of the learned Single Judge of this Court was challenged before

the Division Bench of this Court by filing letters patent appeal no. 304 of 2000 which was decided by the Division Bench of this Court (Coram : D.M. Dharmadhakari, C.J. and J.M. Panchal,J.) on 17.7.2000 and has observed as under:

"So far as the ground urged that the Forest Department is not covered by the definition of Industry under the Industrial Disputes Act is concerned, we find that no such ground was urged before the learned Single Judge. It is a mixed question of law and fact. "

In the said decision, Division Bench of this Court has considered the decision of the apex court in CHIEF CONSERVATOR OF FOREST DN AND OTHERS V. JAGANNATH MARUTI KONDHARE AND OTHERS (1996) 2 293 wherein the activities of the State in Panchgaon Parwati Scheme in Pune District and Social Foresting Work in Ahmednagar District undertaken in the forest department of Maharashtra came up for consideration before the apex court and it has been held by the apex court that the departments of the State engaged in such activities are covered within the definition of 'industry' and the recourse to the provisions of the I.D. Act,1947 could be made and the apex court has, therefore, not accepted the contention that the forest department is not covered within the definition of 'industry' and ultimately, the appeal filed by the State of Gujarat against the judgment of the learned Single Judge of this Court was dismissed by the Division Bench of this Court.

That judgment of the Division Bench of this Court was challenged before the apex court in Civil Appeal No. 6412 of 2002 which was dismissed by the apex court on 26th March, 2001. Before the apex court, the petitioner State of Gujarat has raised the contention that the Forrest department is not an industry. In respect of the said contention, it has been held by the apex court as under in the said appeal :

"This contention has not been raised squarely either before the Tribunal in another proceedings or in the proceedings before the High Court at any stage. In the absence of this contention, we are unable to accept the submission of the earned counsel for the appellants. The Single Judge as well as the Division Bench had proceeded on the basis that the respondents were employees of the Forest Department. On an earlier occasion, when the employees of the forest department had gone

to the labour court and succeeded in getting an award in their favour, the same was upheld by the High Court and also by this Court."

In the matter before hand also, no such contention has been raised either before the conciliation officer in the conciliation proceedings or in the reference proceedings before the labour court, at any stage that the irrigation department of the petitioner establishment is not an industry and, therefore, the same can now not be permitted to be raised by the petitioner at this stage for the first time since it is a mixed question of law and facts, as otherwise, it amounts to injustice to the respondents because if such contention would have been raised by the petitioner before the labour court, then, the respondent workmen would have got an opportunity to deal with it and controvert it by producing necessary material before the labour court and in that eventuality, the labour court would have an opportunity to decide it on the basis of the facts and law and considering that contention, if the legality, validity and propriety of the award made by the labour court is examined, then, the respondents may not be having reasonable opportunity to defend their case before this court. In view of these factual aspects of the matter, this contention raised before this Court for the first time at this stage is not required to be considered by this court.

The said question and similar situation arose before the Hon'ble Apex Court in case of Krishi Utpadan Mandi Samiti through its Secretary, Anand Nagar and Arvind Chaubey and Another reported in 2003-I-LLJ page 507. In the said decision, as regards the plea of the appellant that it was not an 'industry' under the UP Industrial Disputes Act, 1947, it has been observed by the Hon'ble Apex Court that one, the appellant did not raise such a contention before the Industrial Tribunal, it was not available to be canvassed higher up. The relevant observations made in para 2 of the said decision are reproduced as under:

"2. Learned senior counsel for the appellant contended that the appellant Mandi Samiti is not an 'industry' governed by the provisions of the U.P. Industrial Disputes Act, 1947. The High Court has held against the appellant on the ground that such a contention was not canvassed before the Industrial Tribunal and also following an earlier decision of another Bench, the High Court dismissed the writ petition. Once the

appellant did not raise such a contention before the Industrial Tribunal, it was not available to be canvassed higher up."

Learned G.P. Mr. Oza, though conceded that such contention has not been raised by the petitioner before the labour court, has seriously raised the same before this court and in support of such contention, he has placed reliance upon certain decisions of the division bench of this court as well as three decisions of the apex court and has submitted that the irrigation department is not an industry as held by the apex court as well as the division bench of this court and, therefore, reference itself was bad and as a result thereto, award is also without jurisdiction.

Law on this point has been settled by the Hon'ble apex court since long that the irrigation department is an industry. However, since 1996 and onward, there are different views in this regard that the irrigation department is not an industry and the telecommunication department is also not an industry. Therefore, in view of this legal position, often such question is being raised by the State of Gujarat before the labour court or the industrial tribunal and before this court also and if not raised before the labour court or the tribunal, then, raised before this Court for the first time like the present case and, therefore, on each and every such occasion, decision is required to be taken either by the labour court or this court. In view of this, since such question has been seriously raised by the petitioner, it would be just and proper to examine this question in this group of petitions though not raised before the labour court in the reference proceedings and though not considered by the labour court. I am, therefore, examining this question as to whether the irrigation department is an industry or not within the meaning of section 2(j) of the Industrial Disputes Act, 1947. I am referring to certain relevant decisions of this Court as well as various other High Courts and the Hon'ble Apex Court as under:

In the case of PWD EMPLOYEES' UNION THROUGH ITS SECRETARY M.W. SHENDE & ORS. V. STATE OF GUJARAT & ORS. reported in 1987 (2) GLR page 1070, this question has been examined by the division bench of this court. The Division Bench of this Court has considered the decision of the apex court in the case of Bangalore Water Supply v. A. Rajappa reported in AIR 1978 SC 548 and other relevant decisions and ultimately division bench of this Court has observed as under in para 15 and 19 :

"15. It is in the context of this settled legal position that we have to examine the question posed before us. In our opinion it is difficult for us to agree with the contention of the learned Assistant Government Pleader, appearing on behalf of the State Government, that the employees working in the Irrigation section of the Public Works Department are not the workmen in the terms of the definition of the said term given in Sec.2[s] of the Industrial Disputes Act. It will be too wide a proposition to canvas that merely because they are State Government servants, they are not within the purview of the Industrial Disputes Act. Merely because the employer of these petitioners before us is the State Government, it cannot be said that they would be beyond Industrial Disputes Act, and not entitled to the benefits of the Act. This proposition is not capable of being sustained. As has been pointed out in Bangalore Water Supply's case [supra], the true test which has been evolved and approved by the Supreme Court is that what is the nature of the actual functions assumed; is it a service that the State could have left to the private enterprise and, if so fulfilled, such a dispute be industrial dispute ? In other words, as pointed out by Krishna Iyer, J., the nature of the actual functions and of the pattern of organized activity is decisive. As pointed out by Gajendragadkar, J. in Hospital Majdoor Sabha's case [supra] that it is the character of the activity which decides the question as to whether the activity in question attracts the provision of Sec. 2[j] and not that who conducts the activity or whether it is conducted for profit or not. These questions are not relevant for purposes of determining as to whether a particular activity is industry or not. Applying the workable principles laid down by Gajandragadkar J., in Hospital Majdoor Sabha's case and approved in Bangalore Water Supply's case [supra], in ultimate analysis the answer to the question as to whether a particular activity is industry or not depends upon as to whether the activity is a systematic activity organized by co-operation between employer and employee for the production and / or distribution of goods is services calculated to satisfy human wants and wishes as distinguishable from spiritual or

religious needs of the people. The true criterion is "function" and the conclusive test is the nature of activity with special emphasis on employer employee relations. It is these test of unction' of the activity, or in other words, the nature of the activity, which promoted the Supreme Court to decide in Hospital Majdoor Sabha's case [supra] that the State in running a group of hospitals for medical relief and education was carrying on an industry, and the employees working in the hospitals were entitled to the benefits under the Industrial Disputes Act. Subba Rao J., has put it more tersely in Nagpur City Corporation's case [supra], when he said that if a service rendered by an individual or a private person would be an industry, it would equally be an industry in the hands of a Corporation, and if service rendered by the Corporation is an industry, the employees working in the departments connected with that service irrespective whether it may be financial, administrative or executive, would be entitled to benefits of the Act. No doubt, if the nature of functional is sovereign functions in the sense the functions which are primary and inalienable functions of the State, they are necessarily excluded from the purview of the definition. Subba Rao, J., made it clear that such functions shall be ordinarily confined to legislative power, administration or law and judicial power. In other words, these functions are primarily functions of the State and they cannot be alienated by the State in favour of private individuals or bodies. Krishna Iyer, J. elaborated these excluded activities by emphasizing that sovereign functions strictly understood alone qualify for exemption. The welfare activities or economic adventure undertaken by the Government or statutory bodies do not qualify for being treated as sovereign functions. In our opinion, therefore, it would be difficult, if not impossible to sustain the contention advanced on behalf of the State Government that the employees working in the Irrigation Department of the State Government would be discharging sovereign functions.

19. In that view of the matter we must hold so far as the first question is concerned that the petitioners who are working in the Public Works Department [Irrigation] of the State

Government were entitled to the benefits of the Industrial Disputes Act since the activities undertaken by the Irrigation Department are "Industry" within the definition of the term "Industry" in Sec.2[j] of the Industrial Disputes Act, and they cannot be said to be discharging sovereign functions stricto sensu. Since it is an admitted position that all the petitioners had completed 240 days of service, the were entitled to claim the compliance of Sec.25-F of the Industrial Disputes Act, inasmuch as the procedure prescribed under Section 25-F is not complied with by the State Government, their termination of services is void ab initio and they are entitled to be treated as if in service all along as if there was no break in their service. In that view of the matter, which we are inclined to take on the first question, it is not necessary to go into the second question set out above."

The apex court has, in case of Des Raj etc. State of Punjab, AIR 1988 SC 1182, held that the irrigation of the Government is clearly coming within the ambit of 'industry' under section 2(j) of the ID Act. In the said decision,the apex court has also considered the case of Bengalore Water Supply and Sewerage Board v. A. Rajappa (AIR 1978 SC 548) and elaborate discussion in respect of the various activities carried out by the irrigation department were also considered by the apex court. Ultimately, in para 9 of the judgment the apex court has considered various activities of the irrigation department as under:

"The irrigation department is a branch of the public works department. It provides a reasonably assured source of water for crops through the net work of canals. The irrigation department also carries out schemes and takes measures for protecting crops from the menace of floods during the times of abnormal rainfall. In the olden times when there was no canals, agriculture was very limited and cultivators depended solely on rainfall. By the passage of time it was thought necessary to build irrigation and drainage works for the purpose of providing better water facilities to the farmers on whom depends the economy of this country. These works could only be built by the Government.

In para 11 to 13 of the same judgment, the apex

court has observed as under:

11. In State of Rajasthan v. The Industrial Tribunal, Rajasthan, [1970] RLW 137 the question for consideration before the Rajasthan High Court was whether the Survey and Investigation Division of Irrigation Department was an industry. In paragraph 26, the learned Judge came to the conclusion by saying:

"In view of the aforesaid decisions of the Supreme Court, I find it difficult to hold that the activities of the State Government by organizing its Survey and Investigation. Division in the Irrigation Department through which the State Government rendered services in the matter of supplying water by constructing canals and dams does not fall within the ambit of the sovereign or regal functions of the State. Such service to the people at large, in my opinion, comes within the ambit of the expression industry as defined in section 2(j) of the Act."

The finding runs contrary to the conclusion. If in the opinion of the learned Judge, it was difficult to hold that the activities did not fall within the ambit of the sovereign or regal functions, then the conclusion should have been different.

12. In Dinesh Shanna & Ors. v. State of Bihar & Ors., [1983] Bihar L.J.R. 207, a Division Bench of the Patna High Court was considering if the Public Health Engineering Department of the State of Bihar was an industry. In paragraph 8 of the judgment, reliance was placed on the Bangalore Water Supply case (supra) and the Nagpur Corporation case (supra) and it was held that the said department of the State Government of Bihar was an industry. In Chief Engineer, Irrigation, Orissa v. Harihar Patra & Anr., [1977] L.I.C. 1033 a Division Bench of the Orissa High Court was considering whether the Salandi Irrigation Project in that State was an industry. The High Court relied upon the earlier full-Bench decision of its own Court and some of the decisions of this Court which we have referred to above, and came to hold that the irrigation project was an industry.

13. The Administrative Report of the facts found by the High Court in the instant case have attempted to draw out certain special features. The legal position has been indicated in the earlier part of our judgment. On the tests, as already laid down in the judgments, we do not think these facts found in this case can take out the Irrigation Department outside the purview of the definition of 'industry'. We have already referred to the Dominant Nature test evolved by Krishna Iyer, J. The main functions of the Irrigation Department where subjected to the Dominant Nature test clearly come within the ambit of industry. We have not been able to gather as to why even six years after the amendment has been brought to the definition of industry in section 2(j) of the Act the same has not been brought into force. This Court on more than one occasion has indicated that the position should be clarified by an appropriate amendment and when keeping in view the opinion of this Court, the law was sought to be amended, it is appropriate that the same should be brought into force as such or with such further alterations as may be considered necessary, and the legislative view of the matter is made known and the confusion in the field is cleared up."

The apex court had also an occasion in case of Chief Conservator of Forests v/s. Jagannath Maruti Kondhare reported in AIR 1996 SC 2898 where the question as to whether the forest department is an industry or not, has been examined by the apex court. While considering that aspect, the apex court has also considered the decision in case of Bengalore Water Supply and Sewerage Board v. A. Rajappa (Supra) and the Corporation of Nagpur reported in AIR 1960 SC page 675. Relevant observations made by the apex court Chief Conservator of Forests v. J.M. Kondhare, AIR 1996 SC page 2898, in para 12, are reproduced as under:

"12. We may not go by the labels. Let us reach the hub. And the same is that the dichotomy of sovereign, and non-sovereign function does not really exist, it would all depend on the nature of the power and manner of its exercise, as observed in para 23 of Nagendra Rao's case (1994 AIR SCW 3753). As, per the decision in this case, one of the tests to determine whether the executive function is

sovereign in nature is to find out whether the State is answerable for such action in Courts of law. It was stated by Sahai, J. that acts like defence of the country, raising armed forces and maintaining it, making peace of war, foreign, affairs, power to acquire and retain territory, are functions which are indicative or external sovereignty and are political in nature. They are, therefore, not amenable to the jurisdiction of ordinary civil court inasmuchas the State is immune from being used in such matters. But then, according to this decision, the immunity ends there. It was then observed that in a welfare State, functions of the State are not only the defence of the country or administration of justice or maintaining law and order but extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even martial. Because of this, the demarcating the line between sovereign and non sovereign powers has largely disappeared."

Relevant para 12 to be taken from page 2897 of AIR 1996 SC 3rd Volume

The observations made in para 13 and 17 of the said judgment are reproduced as under:

"13. The aforesaid shows that if we were to extend the concept of sovereign function to include all welfare activities as contended on behalf of the appellants, the ratio in Bengalore Water Supply Case "AIR 1978 SC 548" would get eroded, and substantially. We would demur to do so on the face what was stated in the aforesaid case according to which except the strictly understood sovereign function, welfare activities of the State would come within the purview of the definition of industry and not only this , even within the wider circle of sovereign function, there may be an inner circle encompassing some units which could be considered as industry if substantially severable.

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17. This being the position, we hold that the aforesaid scheme undertaken by the Forest Department cannot be regarded as a part of sovereign function of the State and so, it was

open to the respondents to invoke the provisions of the State Act. We would say the same qua the social foresting work undertaken in Ahmednagar District. There was, therefore, no threshold bar in knocking the door of the industrial courts by the respondents making a grievance about adoption of unfair labour practice by the appellants. "

In case of GENERAL MANAGER, TELECOM V. S.S.RAO 1997[2] GLH 990, Three Judges' Bench of the apex court has held that the telecom department is industry considering the domain nature test as laid down in Bengalore Water Supply and Sewerage Board case as a binding precedent. IN view of the test laid down, tele com industry is an industry. In para 3 and 7 of the said judgment, it has been observed by the apex court as under:

"3. This matter comes up before a three Judge Bench because of a Reference made by a two-Judge Bench which doubted the correctness of an earlier two Judge Bench decision of this Court in Sub-Divisional Inspector of Post, Vaikam & Ors. V. Theyyam Joseph & Ors. JT 1996 [2] SC 457 = [1996] 8 SCC 489. It was stated at the Bar that a later two-Judge Bench decision reported as Bombay Telephone Canteen Employes' Association v. Union of India - JT 1997 [6] SC 57 = AIR 1997 Supreme Court 2817 also takes the same views as in the case of Theyyam Joseph.

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7. A two-Judge Bench of this Court in Theyyam Joseph's case [1996] 8 SCC 489 [supra] held that the functions of the Postal Department are part of the sovereign functions of the State and it is, therefore, not an "industry" within the definition of Section 2[j] of the Industrial Disputes Act, 1947. Incidentally, this decision was rendered without any reference to the seven-Judge Bench decision in Bombay Telephone Canteen Employees' Association case - AIR 1997 SC 2187, this decision was followed for taking the view that the Telephone Nigam is not an industry. Reliance was placed in Theyyam Joseph's case [1996] 8 SCC 489 [supra] for that view. However, in Bombay Telephone Canteen Employees' Association case [i.e. the latter decision], we find a reference to the Bangalore Water Supply case. After referring to the decision in

> Bangalore Water Supply, it was observed that if the doctrine enunciated in Bangalore Water Supply is strictly applied, the consequence is 'catastrophic'. With respect, we are unable to subscribe to this view for the obvious reason that it is in direct conflict with the seven-Judge Bench decision in Bangalore Water Supply case [supra] by which we are bound. It is needless to add that it is not permissible for us, or for that matter any Bench of lesser strength, to take a view contrary to that in Bangalore Water Supply [supra] or to bypass that decision so long as it holds the field. Moreover, that decision was rendered long back nearly two decades earlier and we find no reason to think otherwise. Judicial discipline requires us to follow the decision in Bangalore Water Supply case [1978] 2 SCC 213. We must, therefore, add that the decision in Theyyam Joseph JT 1996 [2] SC 457 = [1996] 8 SCC 489 and Bombay Telephone Canteen Employees' Association [JT 1997 [6] SC 57 = AIR 1997 Supreme Court 2817] cannot be treated as laying down the correct law. This being the only point for decision in this appeal, it must fail."

Thus, in the said decision, Three Judges Bench of the Apex Court has followeod the decision in Bengalore Water Supply Case (supra) as a judicial precedent and laid down that that the decision in Theyyam Joseph JT 1996 [2] SC 457 = [1996] 8 SCC 489 and Bombay Telephone Canteen Employees' Association [JT 1997 [6] SC 57 = AIR 1997 Supreme Court 2817] cannot be treated as laying down the correct law.

In case of Executive Engineer, Yavatmal Medium Project Division & Anr. V/s. Anant S/o Yadao Murate & Anr. reported in 1998 (1) CLR page 403, it has been held by the Bombay High Court that the irrigation project of the irrigation department is an industry within the meaning of section 2(j) of the ID Act, 1947. Relevant observations made in para 13 of the said judgment by the Bombay High Court are reproduced as under:

> "13. On considering all the concepts of industry and after reviewing the various tests which need not be repeated, as the tests were laid down in Bangalore Water Supply' case. The concept of sovereign and regal function was explained in Chief Conservator of Forests. The Apex Court in para 13 specifically rejected an

argument that welfare activities partake sovereign functions on the ground that if such a view was taken it would be eroding the view taken by it in Bangalore Water Supply's case. While observing that welfare activities partake sovereign functions the Apex Court did not notice this in Sub-Divisional Inspector of Post, Vaikam and others. Therefore, considering the various precedents of the Apex Court itself it is clear that the law declared by the Apex Court is that welfare activities do not necessarily partake sovereign functions. In Executive Engineer (State of Karnataka) the reliance was placed on the judgment in the case of Union of India V/s. Jai Narain Singh the Apex Court has merely noted that the Central Ground Water Board is not an industry. It is not possible to discern from that judgment as to what were the reasons for the Apex Court to so hold. The other judgment relied on is that of State of Himachal Pradesh V/s. Suresh Kumar Varma & Anr. (supra). On a perusal of the fact and the law laid down it does not seem that the issue as to whether a particular department was an industry or not was in issue. What was in issue was whether the work charged employees who perform duty of transitory nature were appointed to posts and their appointments were on daily wage based in an appointment to a post. The Apex Court therein noted that such appointments were not appointments to the posts and, therefore, no directions could have been given to re-engage them in any work or appoint them against existing vacancies. Thus the two judgments relied upon by the Apex Court to arrive at the conclusion arrived at in Executive Engineer (State of Karnataka) (supra), nowhere have laid down the tests to hold as to why irrigation Department is to be excluded from the definition of industry. As pointed out earlier, even the case of Sub Divisional Inspector of Post, Vaikam and others was considered by the Apex Court in Physical Research Laboratory and explained the same in paragraph 10 of the judgment. After that, it proceeded to apply the tests as laid down in Bangalore Water Supply. In the case of Des Raj V/s. State of Punjab (supra) the Apex Court had considered the tests laid down in various earlier judgments of the Apex Court itself, culminating in the judgment in Bangalore Water Supply (supra) and thereafter had arrived at a conclusion that the Irrigation Department

falls within the definition of industry within the meaning of Section 2-J of the I.D. Act. I am, therefore, of the considered opinion that the view laid down in Des Raj's case which will have to be followed. Once it is so held and as I have already set out earlier the work of the Irrigation Department of the State of Punjab and the material placed before this Court including the written submissions filed on behalf of the petitioners show that the projects undertaken by the irrigation department of the State of Maharashtra is discharging the same or similar functions as the Irrigation Department of the State of Punjab. It, therefore, follows that the projects of the Irrigation Department or work connected that of the State of Maharashtra, on the same tests as applied by the Apex Court in Des Raj's case would fall within the definition of an industry for the purpose of Section 2-J of the I.D. Act."

The Bombay High Court has followed the case of the apex court in case of Des Raj versus State of Punjab reported in AIR 1988 SC 1182 and the decision in case of Executive Engineer (State of Karnataka) has been held to be per incuriam. That aspect has been discussed by the Bombay High Court in para 12 of the judgment as under:

"12. Therefore, while interpreting the judgment in Des Raj's case and Executive Engineer (State of Karnataka) thus one necessarily will have to proceed on the basis whether the latter judgment in the case of Executive Engineer (State of Karnataka) is per incuriam. A Full Bench of this Court in the case of Kamleshkumar Ishwardas Patel V/s. Union of India & Ors., reported in 1994 Mh. L.J. 1669 was faced with such a situation. The Full Bench of this Court noted that what is binding under Article 141 of the Constitution of India is law declared by the Supreme Court. In the instant case and Des Raj's case the Irrigation Department of Punjab has been held to be an industry based on the definition of industry as it now stands, whereas applying the same definition the Apex Court in the case of Executive Engineer (State of Karnataka) held that it not to be an industry. In the case where the High Court is confronted with two conflicting judgments, the principles have been carved out as to which judgment to be followed when contrary

decisions of the Supreme Court emanate from Benches of equal strength. After considering the various judgments and reproducing the various paragraphs from the judgment of the Calcutta High Court in Bholanath V/s. Madanmohan, reported in AIR 1988 Cal. 1. The Full Bench of this Court concurred with the law as enunciated in Bholanath's case. The proposition that was accepted in Bholanath's case was if contrary decisions of the Supreme Court emanate from Benches of equal strength, the course to be adopted by the High Court is, firstly to try to reconcile and to explain those contrary decisions by assuming, as far as possible, that they applied to different sets of circumstances. However, when such contrary decisions of co-ordinate Benches cannot be reconciled then the High Court is not necessarily to follow the one which is later in point of time, but may follow the one which in its view is better in point of law. The Full Bench of this Court noted that there were two views on interpretation (1) that the later pronouncement had to be followed and (2) that one which is better in point of law. The Full Bench preferred to accept the latter view after considering the various other judgments and further that this approach was in consonance with what ancient Jurist Narada declared - Dharmashastra Virodhe Tu Yuktiykta Vidhe Smrita - that is, when the Dharmashastra or Law Codes of equal authority conflict with one another, the one appearing to be reasonable, or more reasonable is to be preferred and followed. The views of modern Jurist, Seervai, has also advocated a similar principle was also relied upon. Therefore, the task before me is clear as laid down by the Full Bench that what has to be followed is the view which is better in point of law."

In case of COIR BOARD ERNAKULAM KERALA STATE AND ANOTHER V/s. INDIRA DEVAI P.S. AND OTHERS, reported in 2000 SCC (L & S) 120, larger bech of the apex court has has considered whether reconsideration of the decision in Bengalore Water Supply and Sewerage Board (supra) would require reconsideration or not by the Seven Judge Bench of the apex court and the answer given by the Larger Bench of the apex court in para 1 and 2 of the said decision is reproduced as under:

"1. We have considered the order made in

Civil Appeals Nos. 1720-21 of 1990. The judgment in Bangalore Water Supply & Sewerage Board V/s. A. Rajappa was delivered almost two decades ago and the law has since been amended pursuant to that judgment though the date of enforcement of the amendment has not been notified.

2. The judgment delivered by seven learned Judges of this Court in Bangalore Water Supply Case does not, in our opinion, require any reconsideration on a reference being made by a two-Judge Bench of this Court, which is bound by the judgment of the larger Bench."

The apex court has decided that the law laid down in Bengalore Water Supply and Sewerage Board (supra) does not require any reconsideration on reference being made by the Two Judges Bench of the apex court.

In case of STATE OF U.P. V. INDUSTRIAL TRIBUNAL IV, AGRA AND ANOTHER 2002 [93] FLR 209, the Allahabad High Court has held that the irrigation department is an industry. Relevant observations made by the Allahabad High Court in para 3 and 4 of the said judgment are reproduced as under :

"3. The objection taken by the employer was that irrigation department of State U.P. is not an industry. With regard to other aspect that the workman concerned has worked for more than 240 days in the preceding calender months and that the provisions of section 6-N of the Industrial Disputes Act, 1947 have not been complied with before terminating the services of the workman concerned, this writ petition has come before this court with a dispute that irrigation department is not an industry. The learned Single Judge of this Court has dealt with the case reported in State of U.P. v. Presiding Officer, Industrial Tribunal [V], Meerut and another, and held that the decision in Desraj's case holding the irrigation department to be an industry is the correct one. In this view of the matter and that the Somasetty's case with regard to that the State is not an industry, which has been specifically overruled by three Judge's Bench of the Supreme Court in the case of General Manager Telecom v. A. Sri Niwas and others, but that part of Somasetty's case holding that the

State is not an industry, has also been considered.

4. In this view of the matter, in the aforesaid decision this Court has held that the irrigation department is an industry with which I am in full agreement after holding that the irrigation department is an industry, rejecting the objection raised on behalf of the employer and rest of the two arguments that the workman concerned has not completed 240 days and that before terminating the services of the workman concerned, the provisions of Section 6-N have not been complied with are covered by findings of fact, which cannot be assailed and possibly could not be assailed by the petitioner. It is admitted fact that the provision of Section 6-N of the Industrial Disputes Act has not been complied with before terminating the services of the workman concerned."

Thus, in the aforesaid decision of the Allahabad High Court, it has been held that the decision in Desraj's case holding the irrigation department to be an industry is the correct one. and it has also been held that the decision in case of Somasetty that the State is not an industry, which has been specifically overruled by three Judge's Bench of the Supreme Court in the case of General Manager Telecom v. A. Sri Niwas and others, but that part of Somasetty's case holding that the State is not an industry, has also been considered.

Recently also, in case of STATE OF U.P. V. P.O. LABOUR COURT [Utt.H.C.] 2003 [96] FLR 317, Uttaranchal High Court has, after considering the decision of the apex court in Des Raj and others v. State of Punjab and others, as well as the land mark decision of the apex court in Bangalore Water Supply and Sewerage Board v. A. Rajappa's case examined this issue and has held that the department of irrigation is an industry within the meaning of section 2(j) of the Industrial Disputes Act, 1947. Relevant observations made in para 13 and 14 of the said judgment are reproduced as under:

"13. The apex Court in Des Raj and others v. State of Punjab and others, after applying the aforesaid text on the nature and activities carried on by the Irrigation Department held that Irrigation Department is an "Industry".

14. Since the Kalagarh unit is the branch of Irrigation Department therefore, the same is also an Industry within the definition of "Industry" under the U.P. Industrial Disputes Act in view of the law laid down by the Apex Court in Bangalore Water Supply and Sewerage Board v. A. Rajappa's case."

This aspect has been examined in detail by the Karnataka High Court in case of THE TUNGABHADRA BOARD V. SRI EASU 1999 [83] FLR 353. In the said decision, Division Bench of Karnataka High Court has examined as to whether the irrigation department is an industry or not and has observed that we would respectfully follow the view taken by the Supreme Court in Des Raj's case as compared with the view taken by the subsequent two Member Bench in Executive Engineer v. K. Somasetty keeping in view the observations made by the Constitutional Bench in Bengalore Water Supply and Sewerage Board and held that the irrigation department is an industry and establishment amenable to the jurisdiction of the tribunal under the Industrial Disputes Act. Relevant observations made in para 7 and 8 at page 355 and 356 are reproduced as under:

"7. It was next contended that Irrigation Department of Government was not an industry. To substantiate this plea reliance was placed on two member judgment of the Supreme Court in Executive Engineer [State of Karnataka] v. K.Somasetty, whereunder it was held :

"It is now well settled legal position that the Irrigation Department and Telecommunication Department are not an "Industry" within the meaning of definition under the Industrial Disputes Act as held in Union of India v. Jai Narayan Singh, and in State of H.P. v. Suresh Kumar Verma. The function of public welfare of the State is a sovereign function. It is the constitutional mandate under the Directive Principles, that the Government should bring about welfare State by all executive and legislative actions. Under these circumstances, the State is not an "industry" under the Industrial Disputes Act."

It may be noted here that the learned Judges did not notice the decision of the Constitution Bench in Bangalore Water Supply and Sewerage Board's case [supra] and a decision of two member Bench of the supreme Court in Des Raj and others v. State of Punjab and Other. In Desraj's case [supra] it was held that the Irrigation Department in the State of Punjab is an industry. Another two member Bench of the Supreme Court had directed that the matter be placed for setting up a larger bench to re-consider the judgment in Bangalore Water Supply and Sewerage Board [Supra] which was declined by the three member bench in Coir Board, Ernakulam, Kerala State and another v. Indira Devi PS and others, [C.A. No.1720-21/1990 dated November 10, 1998] holding that the judgment of the Constitution Bench in Bangalore Water Supply and Sewerage Board does not require reconsideration. In view of the authoritative pronouncement of the Constitution Bench in the case cited above and the decision in Des Raj's case and the view taken by the three member bench of the Supreme Court that Bangalore Water Supply and Sewerage Board's case does not require any reconsideration, it cannot be held the Department of Irrigation or the management in the present case is not an industry. We would respectfully follow that view taken by the Supreme Court in Desraj's case [supra] as compared with the view taken by the subsequent two member bench in Executive Engineer v. K. Somasetty, [supra] keeping in view the observations of the Constitution Bench in Bangalore Water Supply and Sewerage Board's case and hold that Irrigation Department is an industry and would be amenable to the jurisdiction of the Tribunal under the Industrial Disputes Act.

8. Another thing which needs to the noticed is that in Executive Engineer v. K. Somasetty's case [supra], learned Judges had relied upon their earlier decision relating to Telecommunication Department. View taken by the Bench regarding Telecommunication Department being not an Industry was specifically overruled by a three member bench of the Supreme Court in General Manager Telecom v. S. Srinivasa Rao. It was held :

"A two-Judge Bench of this Court in

> Theyyam Joseph's case [supra] held that the functions of the Postal Department are part of the sovereign functions of the State and it is, therefore, not an "industry" within the definition of Section 2[j] of the Industrial Disputes Act, 1947. Incidentally, this decision was rendered without any reference to the seven-Judge Bench decision in Bangalore Water Supply, [supra]. In a later two-Judge Bench decision in Bombay Telephone Canteen Employees' Association case - AIR 1997 SC 2187, this decision was followed for taking the view that the Telephone Nigam is not an industry. Reliance was placed in Theyyam Joseph's case [1996] 8 SCC 489 [supra] for that view. However, in Bombay Telephone Canteen Employees' Association case [i.e. the latter decision], we find a reference to the Bangalore Water Supply case. After referring to the decision in Bangalore Water Supply, it was observed that if the doctrine enunciated in Bangalore Water Supply is strictly applied, the consequence is 'catastrophic'. With respect, we are unable to subscribe to this view for the obvious reason that it is in direct conflict with the seven-Judge Bench decision in Bangalore Water Supply case [supra] by which we are bound. It is needless to add that it is not permissible for us, or for that matter any Bench of lesser strength, to take a view contrary to that in Bangalore Water Supply [supra] or to bypass that decision so long as it holds the field. Moreover, that decision was rendered long back nearly two decades earlier and we find no reason to think otherwise. Judicial discipline requires us to follow the decision in Bangalore Water Supply case. We must, therefore, add that the decision in Theyyam Joseph and Bombay Telephone Canteen Employees' Association cannot be treated as laying down the correct law. This being the only point for decision in this appeal, it must fail."

I have considered the above referred decisions.

According to my opinion, the law laid down by the Hon'ble Apex Court in Des Raj's case and in the case of Bengalore Water Supply and Sewerage Board that the irrigation department is an industry within the meaning of section 2(j) of the I.D. Act has been taken by various High Courts subsequent to the case of K. Soma Setty. The view taken by the various High Court is to the effect that the law laid down in K. Soma Setty's case has been impliedly overruled by the Three Judges Bench of the Hon'ble Apex Court in case of General Manager Telecom v. S. Srinivasa Rao.

In case of SHANKERJI CHELAJI THAKOR versus State of Gujarat reported in 2000(1) GLH 482, relied on by the learned Government Pleader Mr. A.D. Oza, Division Bench of this Court (Coram : B.C. Patel and A.M. Kapadia,JJ) has, after referring to the decision in case of Executive Engineer (State of Karnataka) v. K. Somasetty reported in 1997 AIR SCW 2627 as well as decision in case of Union of India versus Jai Narayan Singh reported in 1995 Supp. (4) SCC 672 as well as the decision in case of State of H.P. versus Suresh Kumar Verma reported in (1996) 2 JT SC 455, specifically referred to the observations made by the apex court in case of Executive Engineer (State of Karnataka) v. K. Somasetty (supra) that the function of public welfare of the State is a sovereign function; it is the constitutional mandate under the Directive Principles that the Government should bring about welfare State by all executives and legislative actions; under these circumstances, the State is not an 'industry' under the Industrial Disputes Act; even otherwise, since the project has been closed, the respondent has no right to the post since he had been appointed on daily wages. The decision of the Constitutional Bench of the Apex Court in case of Bengalore Water Supply and Sewerage Board has not been considered by the Hon'ble Apex Court in the decisions which have been referred to by the Division Bench of this Court in case of Shankerji Chelaji Thakor v. State of Gujarat. The Division Bench of this Court, in case of Shankerji Chelaji Thakor v. State of Gujarat, has not considered the decisions of the Constitutional Bench of the Hon'ble Apex Court in case of Bengalore Water Supply and Sewerage Board as well as another decision in case of Desraj, reported in 1988 SC 1182 which was on this point whether the irrigation department is industry or not. Therefore, in absence of these important decisions on the suject matter, since the aforesaid decisions of the Hon'ble apex court have not been considered by the Division Bench of this Court in case of Shankerji Chelaji Thakor v. State of Gujarat is not helpful to the petitioner and the same is not

applicable to the facts of the present case because in the said decision, there is no discussion on the issue at all in respect of the question as to whether the irrigation department is an industry or not. That question has not at all been examined by the division bench of this Court and the division bench of this Court has considered decision of the apex court in case of Executive Engineer (State of Karnataka) v. K. Somasetty, 1997 AIR SCW 2627; Union of India v. Jai Narayan Singh reported in 1995 Supp. (4) SCC 672 and the decision in case of State of H.P. v. Suresh Kumar Verma reported in (1996) 2 JT 455 wherein the decision of the constitutional Bench of the Hon'ble apex court in case of Bengalore Water Supply and Sewerage Board as well as the decision in case of Des Raj have not been considered and, therefore, it cannot be said that the decision in case of Shankerji Chelaji Thakor v. State of Gujarat would be helpful to the petitioner State in any manner. It is also necessary to note that the Division Bench of this Court in case of Shankerji Chelaji Thakor versus State of Gujarat, has also not considered the earlier Division of the Division Bench of this Court in case of PWD Employees Union through its Secretary M.W. Shende and others versus State of Gujarat reported in 1987 (2) GLR 1070 which is on the same issue and has just ignored the same.

Learned G.P. Mr. Oza has also relied on the aforesaid three decisions of the Hon'ble apex court in case of Executive Engineer (State of Karnataka) v. K. Somasetty reported in 1997 AIR SCW 2627 as well as decision in case of Union of India versus Jai Narayan Singh reported in 1995 Supp. (4) SCC 672 as well as the decision in case of State of H.P. versus Suresh Kumar Verma reported in (1996) 2 JT SC 455 and has submitted that the irrigation and telecom department are not an industry. However, according to my opinion, that question has been examined by the Three Judges Bench in case of General Manager, Telecom Department versus K. Srinivasan wherein the earlier decision on this point has been impliedly overruled by the Three Judges Bench of the apex court and, therefore, I am of the view that the reliance placed byMr. Oza, on the decisions in case of of Executive Engineer (State of Karnataka) v. K. Somasetty reported in 1997 AIR SCW 2627 as well as decision in case of Union of India versus Jai Narayan Singh reported in 1995 Supp. (4) SCC 672 as well as the decision in case of State of H.P. versus Suresh Kumar Verma reported in (1996) 2 JT SC 455 is misplaced and the same is not helpful to the petitioner in any manner.

I have considered the relevant decisions on the

question as to whether the irrigation department is an industry or not within the meaning of section 2(j) of the Industrial Disputes Act, 1947. The decisions relied upon by the learned GP Mr. Oza are as under:

(1) 2000(1) GLH 482 [Shankerji Chelaji Thakor versus State of Gujarat]
(2) 1997 AIR SCW page 2627 [Executive Engineer (State of Karnataka) v. K. Somasetty]
(3) 1995 Supp (4) SCC 672 [Union of India versus Jai Narayan Singh]
(4) (1996) 2 JT SC 455 [State of H.P. versus Suresh Kumar Verma]

The decisions which have been referred to and relied upon by the learned Government Pleader Mr. Oza have been considered by me. After perusal of each of the decisions which have been relied upon by Mr. Oza, in none of the decisions, real question as to whether the irrigation department is an industry or not within the meaning section 2(j) of the I.D. Act, 1947 has not been examined. That was not an issue which was examined in detail. In all the decisions, real question is altogether different. However, while deciding different question, some observations have been made by the Court in respect of the welfare activities of the State and the sovereign functions of the State, without real examination of the various activities of the irrigation department. In each decisions, mere observations made about the welfare activities of the State and the sovereign function of the State are not related to irrigation Department. However, said decisions have been subsequently followed by the Court but the question is as to whether the observations which have been made in each decision is binding or to consider the same as ratio decidendi or not. How to read the decision and how to apply it to the facts of each case and what is question or the matter at issue, all these aspects have been examined by the Hon'ble Apex Court. The Court is required to find out from the facts of each case, otherwise, any observations made by the Court, whether it related to main issue or not, cannot consider to binding precedent. This aspect has been examined by the Hon'ble Apex Court in the following cases :

In case of Amar Nath Om Prakash and others v. State of Punjab and others reported in AIR 1985 SC page 218, the Hon'ble Apex Court has, while considering the precedents, observed that the judgments are not to be construed as statutes. In para 11 of the said judgment, it has been observed as under:

11. There is one other significant sentence in Sreenivasa General Traders v. State of A.P. (Supra) with which we must express our agreement. It was said, . with utmost respect, these observations of the learned judge are not to be read as Euclid's A theorems, nor as provisions of the statute. These observations must be read in the context in which they appear." We consider it proper to say, as we have already said in other cases, that judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton (1) Lord Mac Doormat observed,

"The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge." D

In Home office v. Dorset Yacht Co.(2) Lord Reid said, "Lord Atkin's speech..... is not to be treated as if it was a statutory definition. It will require qualification in new circumstances." Megarry, J. in 1971(1) W.L.R. 1062 observed, "one must not, of course, construe even a reserved judgment of even Russell L. J. as if it were an Act of Parliament. And, in Herington v. British Railways Board."(2) Lord Morris said:

"There is always peril in treating the words of a speech or judgment as though they are words in a legislative P enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case."

In case of M/s. Gasket Radiators Pvt. Ltd. v. Employees' State Insurance Corporation and another reported in AIR 1985 SC 790, the apex court has observed as under in para 8 of the judgment:

" We once again have to reiterate what we were forced to point out in Amar Nath Om Prakash v. State of Punjab, AIR 1985 SC 218, that judgment of Courts are not to be construed as Acts of Parliament. Nor can we read a judgment on a particular aspect of a question as a Holy Book covering all aspects of every question whether such questions and facets of such questions arose for consideration or not in that case."

In case of Prakash AMichand Shah v. State of Gujarat and others, reported in AIR 1986 SC 468, the Hon'ble Apex Court has observed as under in para 26 of the judgment:

"26. xxx xxx xxx Before embarking upon the examination of these decisions, we should bear in mind that what is under consideration is not a statute or a legislation but a decision of the Court. A decision ordinarily is a decision on the case before the Court while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. Hence, while applying the decision to a later case, the Court which is dealing with it should carefully try to ascertain the true principle laid down by the previous decision. A decision often takes its colour from the questions involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. xxxxx xxxxx"

In para 31 of the said judgment, it has been observed by the Hon'ble apex court as under:

31. xxx xxx An appropriate purpose for which a precedent is used at a later date does not take away its binding character as a precedent. In such cases, there is good reason to disregard the later decision. Such occasions in judicial history are not rare. "

In case of Municipal Corporation of Greater Bombay and others v. Thukral Anjali Deokumar and others, reported in AIR 1989 SC 1194, the Hon'ble Apex Court has observed as under in para 6 of the judgment :

"6. xxx xxx Any observation in a

judgment has to be read and understood in the context of facts of that particular case in respect of which such observation has been made. xxx xxx"

In case of Arnit Das versus State of Bihar reported in [2000] 5 SCC page 488, it has been observed by the Hon'ble Apex Court in para 20 of the judgment :

"20. A decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgment is not the ratio decidendi. This is the rule of sub silentio, in the technical sense when a particular point of law was not consciously determined. (See State of UP v. Synthetics & Chemicals Ltd.[1991] 4 SCC 139, para 41)."

I have considered the aforesaid decisions of the Hon'ble Apex Court that how to read and apply the decision to the facts of the case. In light of the observations made by the Hon'ble Apex Court, now, I am considering the decisions which have been relied upon by the learned G.P. Mr. A.D. Oza. In the said judgments relied on by Mr. Oza, there is no express decision on the subject matter as to whether the irrigation department is an industry or not within the meaning of section 2(j) of the I.D. Act, 1947. Said decisions are not accompanied by 'reason to real issue of industry'. It was not the conscious consideration of an issue of irrigation department, whether it is an industry or not. Said issue really escaped in each of the decisions. Therefore, particular point of law that whether irrigation department is industry or not was not consciously determined in any of the decisions which have been relied upon by the learned Government Pleader Mr. A.D. Oza. On the contrary, the decision of the Constitutional Bench of the Hon'ble Apex Court in Bengalore Water Supply and Sewerage Board (supra) and the decision in case of Des Raj (supra), in case of Jagannath Maruti Kondhare (supra) and the decision of the Division Bench of this High Court in case of PWD Employees Union (supra) was not considered which are on the real issue wherein irrigation department has been held to be the industry within the meaning of section 2(j) of the I.D. Act, 1947. In case of PWD Employees Union (supra), the Division bench of this Court has considered the decision of the Constitutional Bench of the Hon'ble Apex Court and

has, following the ratio of the said judgment of the Hon'ble Apex Court, held that the irrigation department is an industry. However, that earlier decision of the Division Bench of this Court in case of PWD Employees' Union (supra) has not been considered by the Division Bench of this Court in case of Shankerji Chelaji Thakor versus State of Gujarat. Therefore, the decisions referred to and relied upon by the learned Government Pleader Mr.A.D. Oza are not helpful to him and are not applicable to the facts of the present case. Therefore, considering the decision of the Constitutional Bench of the Hon'ble Apex court in case of Bengalore Water Supply and Sewerage Board (supra), case of Des Raj (supra) as well as the earlier decision of the Division Bench of this Court in case of PWD Employees' Union (supra) wherein also the decision of the Hon'ble Apex Court in case of Bengalore Water Supply and Sewerage Board (supra) has been considered by the Division Bench of this Court, I am of the opinion that the irrigation department is an industry within the meaning of section 2(j) of the I.D. Act.

There are two judgments of the Division Bench of this Court. One in case of PWD Employees Union (supra) which is the earlier decision of the Division Bench of this Court wherein, the Division Bench of this Court, following the ratio of the decision of the apex court in case of Bengalore Water Supply and Sewerage Board (supra), has held that the irrigation department is an industry within the meaning of sec.2(j) of the I.D. Act and that issue has been decided by the Division Bench of this Court. Another is the decision in case of Shankerji Chelaji Thakor v. State of Gujarat (supra) which is the subsequent decision given by the Division Bench of this Court wherein the decision of the Constitutional Bench of the Hon'ble Apex court in case of Bengalore Water Supply and Sewerage Board (supra), case of Des Raj (supra) as well as the earlier decision of the Division Bench of this Court in case of PWD Employees' Union (supra) have not been considered by the Division Bench of this Court. In view of this, I am of the opinion that the earlier decision of the Division Bench of this Court in case of PWD Employees Union (supra) as well as the the decision of the Constitutional Bench of the Hon'ble Apex court in case of Bengalore Water Supply and Sewerage Board (supra), case of Des Raj (supra) would hold the field and therefore, I am holding that the irrigation department of the petitioner State is an industry within the meaning of section 2(j) of the Industrial Disputes Act, 1947.

Therefore, according to my opinion, though specific contention has not been raised by the petitioner before the labour court in its written statement and though no evidence to that effect was led before the labour court by the petitioner that the petitioner irrigation department is not an industry and, therefore, the reference itself was not maintainable before the labour court and though it has been raised by the petitioner before this Court for the first time, the petitioner has been permitted to raise the said contention before this Court considering the importance of the question and I am of the view that the irrigation department of the State is an industry within the meaning of section 2(j) of the I.D. Act in view of the law laid down by the Constitutional Bench of the Hon'ble apex court in case of Bengalore Water Supply and Sewerage Board as well as the decision in Des Raj's case and the decision of the Division Bench of this Court in case of PWD Employees Union reported in 1987 XXVIII (2) GLR page 1070 and, therefore, the contention raised by the learned Government Pleader Mr. Oza that the irrigation department is not an industry in view of the decision of this Court in case of Shankerji Chelaji Thakor v. State of Gujarat and decision in case of Executive Engineer (State of Karnataka) v. K. Somasetty reported in 1997 AIR SCW 2627 as well as decision in case of Union of India versus Jai Narayan Singh reported in 1995 Supp. (4) SCC 672 as well as the decision in case of State of H.P. versus Suresh Kumar Verma reported in (1996) 2 JT SC 455 cannot be accepted and I am of the view that the law laid down by the Constitutional Bench of the Hon'ble Apex Court in case of Bengalore would hold the field and I, therefore, hold that the Irrigation Department is an industry within the meaning of section 2(j) of the I.D. Act, 1947.

As regards the another contention raised by Mr. Oza that the labour court ought not to have entertained the reference in view of delay in raising of an industrial dispute, this Court has to consider that part of the award made by the labour court. No doubt, industrial dispute has been raised after the period of about fifteen to 16 years by the respondents workmen from the date of termination of their services. From the perusal of the award and other relevant documents, it is clear that the delay in raising of an industrial dispute has been explained by the respondents workmen firstly before the conciliation officer in conciliation proceedings that as they are illiterate and scheduled tribe persons, were not aware of the law that such dispute has to be raised immediately or within some

reasonable period. It has also been submitted by the workmen covered by these two common awards before the conciliation officer and also before the labour court that they were having some assurance from the petitioner that they will be given the work as and when the work is available and, therefore, they were waiting for such work and, therefore, the action of termination of their service was not immediately challenged by the petitioners. This aspect has been examined by the conciliation officer while making the reference to the labour court for adjudication of the industrial dispute. Considering the explanation tendered by the workmen covered by these two common awards, the conciliation officer has condoned the delay and has referred the industrial disputes raised by the workmen for adjudication before the labour court. If the petitioner would have been really aggrieved by such an order of the conciliation officer, then, the petitioner ought to have challenged that order of reference itself before the higher forum. However, that has not been done. When asked, learned GP Mr. Oza has not been able to explain as to why the petitioner has not challenged the same at the relevant time. It was, submitted by Mr. Oza, learned GP for the petitioner that such contention was raised by the petitioner before the labour court in its written statement. However, I am of the opinion that once the petitioner has not challenged the legality and validity of the order of reference itself on such ground, then, it is not open for the petitioner to raise such contention even before the labour court. It is not open for the petitioner to urge before the labour court to examine the legality, validity and propriety of the order of reference on such a ground. According to the Scheme of the Industrial Disputes Act, 1947, the labour court is having no jurisdiction to decide the legality, validity and propriety of the order of reference. On the contrary, looking to the settled legal position on this point, it is the duty of the labour court to adjudicate the reference on merits and to pass appropriate award under the provisions of the Industrial Disputes Act, 1947. The labour court is also having no jurisdiction to dismiss the matter in default without any adjudication on merits. Therefore, it is the burden upon the labour court to examine the merits of the industrial dispute referred by the conciliation officer. I am, therefore, of the opinion that it is beyond the scope and jurisdiction of the labour court to examine the legality, validity and propriety of the order of reference on the ground of delay. Once the reference has been made by the conciliation officer for adjudication of an industrial dispute, the labour court has to examine the merits of

the matter. As per the settled law on this point, while granting the relief after considering the merits of the matter, the labour court can take the delay into consider and can mould the relief in view of the delay. In the instant case also, while granting the relief after examining the merits of the matter, the labour court has taken into consideration the delay and has not granted any back wages or continuity of service as stated earlier. Thus, that aspect has been taken care of by the labour court while granting the relief. Therefore, it cannot be said that the delay has not at all been explained by the workmen nor could it be said that such delay has not at all been taken into consideration by the labour court while granting the reliefs in favour of the workmen. Specific issue to that effect has been framed by the labour court. The labour court has decide this question by relying upon the original file of the conciliation officer and also after considering the explanation given by the workmen. The labour court has relied upon the decision of the Hon'ble Apex Court in the matter of Ajayab Singh versus Sirhind Coop. Marketing Cum Processing Services Society Ltd. & Anr. reported in 1999 I CLR 1068 and considering the facts of the case in light of the explanation given by the workmen and also considering the observations made by the apex court in case of Ajayab Singh (supra), the labour court has come to the conclusion that merely because of delay, industrial dispute cannot be said to have ceased and it would remain in existence and, therefore, considering the order of reference made by the conciliation officer and also considering the explanation tendered by the workmen, the labour court has condoned the delay and has rightly condoned the delay and was right in deciding the references on merits.

Learned GP Mr. Oza has also relied on the decision in case of Patel Raghav Natha reported in 10 GLR page 992. I have gone through the said decision, Said decision is given under the Tenancy Act whereas the case before hand is under the Industrial Disputes Act, 1947. There would be different angle and considerations while considering the delay under the Tenancy Act and the same may not be the angle and considerations while considering the delay under the Industrial Disputes Act, 1947. In case of Ajayab Singh v. Sirhind Coop. Marketing cum Processing Service Society Ltd. & Anr. reported in 1999 I CLR 1068, the apex court has examined as to how much time is required to raise the dispute before the conciliation officer. In para 10 and 11 of the said judgment, it has been observed by the Hon'ble apex court

as under:

"10. It follows, therefore, that the provisions of Art.137 of the Schedule to Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the labour court can be generally questioned on the ground of delay alone. Even in a case where the delay is shown to be existing, the tribunal, Labour Court or board, dealing with the case can appropriately mould the relief by declining to grant back wages to the workman till the date he raised the demand regarding his illegal retrenchment / termination or dismissal. The Court may also in appropriate cases direct the payment of part of the back wages instead of full back wages. Reliance of the learned counsel for the respondent management on the full bench judgment of the Punjab and Haryana High Court in Ram Chander Morya v. State of Haryana 1999 [1] SCT 141 is also of no help to him, in tat case the High Court nowhere held that the provisions of Art.137 of the Limitation Act were applicable in the proceedings under the Act. The Court specifically held "neither any limitation has been provided nor any guidelines to determine as to what shall be the period of limitation in such cases." However, it went on further to say that "reasonable time in the cases of labour for demand of reference or dispute by appropriate government to labour tribunal will be five years after which the government can refuse to make a reference on the ground of delay and laches if there is no explanation to the delay." We are of the opinion that the Punjab and Haryana High Court was not justified in prescribing the limitation for getting the reference made or an application under S.37-C of the Act to be adjudicated. It is not the function of the Court to prescribe the limitation where the Legislature in its wisdom had thought it fit not to prescribe any period. The Courts admittedly interpret law and do not make laws. Personal views of the Judges presiding the Court cannot be stretched to authorize them to interpret law in such a manner

which would amount to legislation intentionally left over by the Legislature. The judgment of the Full Bench of the Punjab and Haryana High Court has completely ignored the object of the Act and various pronouncements of this Court as noted hereinabove and thus is not a good law on the point of the applicability of the period of limitation for the purposes of invoking the jurisdiction of the courts/ boards and tribunal under the Act.

11. In the instant case the respondent management is not shown to have taken any plea regarding delay as is evident from the issues framed by the Labour Court. The only plea raised in defence was that the Labour Court had not jurisdiction to adjudicate the reference and the termination of the services of the workman was justified. Had this plea been raised, the workman would have been in a position to show the circumstances preventing him in approaching the Court at an earlier stage or even to satisfy the court that such a plea was not sustainable after the reference was made by the Government. The learned Judges of the High Court, therefore, were not justified in holding that the workman had not given any explanation as to why the demand notice had been issued after a long period. The findings of facts returned by the High Court in writ proceedings, even without pleadings were, therefore, unjustified. The High Court was also not justified in holding that the courts were bound to render an even handed justice by keeping balance between the two different parties. Such an approach totally ignores the aims and object and the social object sought to be achieved by the Act. Even after noticing that "it is true that a fight between the workman and the management is not a just between equals," the Court was not justified to make them equals while returning the findings which it allowed to prevail, would result in frustration of the purpose of the enactment. The workman appears to be justified in complaining that in the absence of any plea on behalf of the management and any evidence, retarding delay, he could not be deprived of the benefits under the Act merely on technicalities of law. The High Court appears to have substituted its opinion for the opinion of the Labour Court which was not permissible in proceedings under Art.226/227 of the

Constitution."

In the very same judgment, the apex court has considered the object of the I.D. Act, 1947. The observations made by the Hon'ble apex court in that regard at page 1071 are reproduced as under:

6. "... ... ... The emergence of the concept of welfare state implies an end to exploitation of workman and as a corollary to that collective bargaining came into its own. The Legislature had intended to protect workmen against victimization and exploitation by the employer and to ensure termination of industrial disputes in a peaceful manner. The object of the Act, therefore, is to give succour to weaker sections of the society which is a pre-requisite for a welfare State. To ensure industrial peace and pre-empt industrial tension, the Act further aims at enhancing the industrial production which is acknowledged to be life-blood of a developing society. The Act provides a machinery for investigation and settlement of industrial disputes ignoring the legal technicalities with a view to avoid delays, by specially authorized courts which are not supposed to deny the relief on account of the procedural wrangles. The Act contemplates realistic and effective negotiations, conciliation and adjudication as per the need of the society keeping in view the fast changing social norms of the developing country like India. It appears to us that the High Court had adopted a usual approach in deciding the matter apparently ignoring the purpose, aim and object of the Act."

This issue has also been examined by the apex court in case of Mahavir Singh v. UP State Electricity Board & Ors. reported in 1999 II CLR page 7. The observations made by the apex court in para 3 of the said judgment are reproduced as under:

"3. Once, the termination is held to be illegal, we fail to appreciate how the entire reference could have been rejected. The dispute lingered on for number of years. That would not mean that the dispute had ceased to exist. It is, of course, true that belatedly the dispute was raised but that has been taken care of by the Labour Court by not awarding full back wages but

only 50 per cent of the back wages all throughout from the date of termination till reinstatement. Which order as passed by the Labour Court could not be said to be in any way uncalled for and illegal. "

In case of Karamchand versus Government of India, Ministry of Labour and another reported in 2001 (3) CLR page 323, it has been observed as under in para 8 and 13 of the judgment by the Punjab and Haryana High Court:

"8. The third reason is regarding the dispute having been raised belatedly. It is not that dispute has to be raised within three years as it is well settled that Article 137 of the Limitation Act is not applicable to the disputes which are raised under the industrial disputes Act, (hereinafter referred to as "the Act"). Various aspects have to be considered. Relying on the judgments of the Supreme Court in the cases of Ajaib Singh v. The Sirhind Cooperative Marketing cum Processing Service Society Limited and ANr. 1999 I CLR 1194 SC and the case of Nedungadi Bank Limited v. K.P. Madhavankutty and others AIR 2000 SC 839, the Division Bench of this Court (in which I was a member) in the case of Surjit Singh v. PO and others CWP No. 9580 of 1000decided on 31st October, 2000 has formulated the following points:

1. No limitation is prescribed under the Act.

2. If plea of delay is not taken, the delay may not be considered.

3. If plea of delay is taken, it should be considered.

4. If a dispute has become state, it should not be revived after a lapse of long period if the plea regarding delay has been taken.

9. xxx xxx xxx

10. Learned counsel for the respondents has cited the case of Ram Avtar Singh and others v. State of Haryana and others AIR 1965 SC 915 and has relied on the following observations of the Supreme Court.

'5. Now if the Government performs an administrative act while either making or refusing to make a reference under section 10(1), it cannot dwelve into the merits of the dispute. That would certainly be in excess of the powers conferred by section 10. Section 10 requires the appropriate Government to be satisfied that an industrial dispue exists or is apprehended. This may permit the appropriate Government to determine prima facie whether an industrial dispute exists or the claim is frivolous or bogus or put forth for extraneous and irrelevant reasons not for justice or industrial peace and harmony. Every administrative determination must be based on grounds relevant and germane to the exercise of power. If the administrative determination is based on grounds irrelevant, extraneous or not germane to the exercise of power, it is liable to be questioned in exercise of the power of judicial review. "

Similar question was also examined by the Bombay High Court in case of Chief Executive Officer, Jilla Parishad versus Shahezadbee reported in 2002 (94) FLR page 479. Relying on the judgment in Sapan Kumar Pandit v. UP State Electricity Board and others reported in 2001 (90) FLR 754(SC), it has been observed as under in para 13, 14 and 15:

"13. While dealing with the provisions of section 4-K of the UP Industrial Disputes Act, 1947 which is in tune with section 10 of the Industrial Disputes Act, 1947, the Apex Court in M/s. Western India Watch Co. Ltd. v. Western India Watch Co. Workers Union, has held that;

'Therefore, the expression 'at any time' though seemingly without any limits is governed by the context in which it appears. Ordinarily, the question of making a reference would arise after conciliation proceedings have been gone through and the conciliation officer has made a failure report. But the Government need not wait until such a

> procedure has been completed. In an urgent case, it can 'at any time' i.e. even when such proceedings have not begun or are still pending, decide to refer the dispute for adjudication. The expression at any time thus takes in such cases as where the Government decides to make a reference without waiting for conciliation proceedings to begin or to be completed. As already stated, the expression 'at any time' in the context in which it is used postulates that a reference can only be made if an industrial dispute exists or is apprehended. No reference is contemplated by the section when the dispute is not an industrial dispute, or even if it is so, if no longer exists or is not apprehended, for instance, where it is already adjudicated or in respect of which there is an agreement or a settlement between the parties or where the industry in question is no longer in existence.

"14. At this stage, it is also necessary to note the ruling of the Apex Court dealing with the issue relating to the sufficient cause for delay in approaching the Court or Tribunal, in N. Balakrishnan v. M. Krishnamurthy, wherein it is held that :

"The primary function of a Court is to adjudicate the dispute between the parties and to advance substantial justice. The time-limit fixed for approaching the Court in different situations is not because on the expiry of such time a bad cause would transform into a good cause."

It is further held thus :

"Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair is to the damage caused by reason of legal injury."

Lastly, the Apex Court in Sapan Kumar Pandit v. U.P. State Electricity Board and others, has held that :

"Though no time is fixed for making the reference of a dispute for adjudication, could any State Government revive a dispute which had submerged in stupor by long lapse of time and re-kindled by making a reference of it to adjudication ? The words "at any time" as used in the Section are prime facie indicator to a period without boundary. But such an interpretation making the power unending would be pedantic. There is inherent evidence in this section itself to indicate that the time has some circumscription. The words "where the Government is of opinion that any industrial dispute exists or is apprehended" have to be read in conjunction with the words "at any time". They are, in a way, complimentary to each other. The Government's power to refer any industrial dispute for adjudication has thus on limitation of time and that is, it can be done only so long as the dispute exists. In other words, the period envisaged by the enduring expression "at any time" terminates with the eclipse of the industrial dispute. It therefore, means that if the dispute existed on the day when the reference was made by the Government it is idle to ascertain the number of years which elapsed since the commencement of the dispute to determine whether the delay would have extinguished the power of the Government to make the reference."

The Apex Court has further held that :

"Hence, the real test is, was the industrial dispute in existence on the date of reference for adjudication ? If the answer is in the negative then the Government's power to make a reference would have extinguished. On the other hand, if the answer is in positive terms the Government could have exercised the power whatever be the range of the period which lapsed since the inception of the dispute. That apart, a decision of the Government in this regard cannot be listed on the possibility of what another party would think whether any dispute existed or not. The section indicates that if in the opinion of the Government the dispute existed then the Government could make the reference. The only authority which can form such an opinion is the Government. If the Government decides to make the reference there is a presumption that in the

opinion of the Government there existed such a dispute."

Considering the earlier decisions of the Apex Court, it has been further ruled therein that :

"There are cases in which lapse of time had caused fading or even eclipse of the dispute. If nobody had kept the dispute alive during the long interval it is reasonably possible to conclude in a particular case that the dispute ceased to exist after some time. But when the dispute remained alive though not galvanized by the workmen or the union on account of other justified reasons it does not cause the dispute to wane into total eclipse. In this case when the Government have chosen to refer the dispute for adjudication under Section 4-K of the U.P. Act the High Court should not have quashed the reference merely on the ground of delay. Of course, the long delay for making the adjudication could be considered b the adjudicating authorities while moulding its reliefs. That is a different matter altogether."

15. Considering the law laid down by the Apex Court in relation to the interpretation of Section 10[1][c] of the Industrial Disputes Act and more particularly in the matter of limitation for reference of industrial dispute for adjudication, it is now well settled that mere lapse of time would not be a justification for answering the reference in negative. In case, where the disputes are alive, noting prevents the Government from referring the same for adjudication merely because there is a delay from the date of dismissal till disposal of reference. Viewed from this angle, therefore, no fault can be found with the impugned Award rejecting the contention regarding delay in making reference to the Court once it is apparent from the record that the dispute was very much alive on the date of reference and it had not become a state dispute as such. The existence of dispute on the day of reference thereof for adjudication by the Labour Court was, in fact, never in dispute. The decision of learned Single Judge in Dhyaneshwar Rakmaji Aher's case is of no help to decide the issue in the matter, as the same is only the point of necessity of justification for the delay and not on the point in issue in the matter.

Likewise the decision of the Apex Court in Katiji and others is also not applicable to the matter in issue."

Therefore, in view of the observations as aforesaid of the High Court as well as of the Hon'ble apex court, mere delay would not cease the dispute to exist. The only thing required to be considered is that at the relevant time, when the reference has been made, whether the dispute between the parties existed or not. Considering the facts of the present case, according to my opinion, when the dispute has been raised, at that time, dispute was existing and it has rightly been referred by the conciliation officer to the labour court concerned and in doing so, according to my opinion, the labour court has not committed any error. The labour court was right in deciding the reference on merits and, therefore, the contention raised by the learned GP Mr. Oza about delay and laches and stale reference cannot be accepted in view of the facts of the present case and the same is, therefore, rejected.

Next is the contention raised by Mr. Oza that the respondents were engaged as daily wager for the work of Ukai Dam and Canal work and the work has now been stopped and there is no work of construction on the dam or canal and therefore, the services of the respondents workmen were rightly terminated and they were not appointed on any regular vacant post and, therefore, award of their re-engagement made by the labour court is bad, illegal and contrary to law. It is necessary to be noted that details in respect of the service period were given by each workmen in the form of affidavit and relevant documents were on record and it was proved that each workman has completed service of more than one year and completed 240 days continuous service. It has also been proved that their services were terminated without giving any notice or notice pay in lieu thereof and they were also not paid any retrenchment compensation and that part of the matter has not been disputed by the petitioner before the labour court and even before this Court too. In light of these admitted facts, the labour court has considered important aspect that there was admission of the witness for the petitioner before the labour court that the work which was performed by these workmen respondents was performed by the newly recruited workmen who were engaged by the petitioner after the respondents were removed. It has come on record that such newly recruited workmen were 450 and it has also come on record that at present, they are working. This

fact has been specifically clarified by the advocate for the petitioner Mr. C.K. Soni before the labour court that similar work is also being performed by newly recruited 450 workmen at present. Similarly, this fact has also been admitted by the witness for the petitioner before the labour court as stated earlier in this judgment. In view of such admission made by the advocate for the petitioner before the labour court and also by the witness for the petitioner before the labour court that subsequently 450 newly recruited workmen were engaged for doing the same type of work, the labour court was of the view that before calling those 450 workmen and before engaging them for such similar type of work, the petitioner has not called the present respondents and has not offered the work as required under section 25H of the I.D. Act, 1947. In view of such evidence on record, the labour court has held that there was breach of the mandatory provisions of section 25-H of the I.D. Act and, therefore, in view of the breach of the mandatory provisions of section 25-H of the I.D. Act, the labour court thought it proper to direct the petitioner to re-engage the respondents workmen as a fresh employee without any back wages and continuity for the interim period and without giving any permanent post to the respondents. I am of the view that such directions issued by the labour court keeping in mind entire facts and circumstances of the case such as delay, violation of section 25H of the ID Act, has rightly moulded the relief and not imposed any financial burden upon the employer petitioner about the back wages for the intervening period and other consequential benefits but has granted only employment as a daily wager to the respondent and that too without any back wages for the intervening period and continuity of service has also been denied and, therefore, I am of the opinion that the award made by the labour court is quite just, proper, reasonable and balanced award which does not require any interference of this court in exercise of the powers under Article 227 of the Constitution of India.

It is the contention of the learned Government Pleader Mr. Oza that all the respondent workmen were engaged in the Project of Ukai Dam and Canal Work; that work was over which has resulted in termination of services of the respondents and, therefore, they are not entitled for reinstatement in service. In support of such contention, he has placed reliance on certain decisions as stated earlier. If this contention of Mr. Oza is appreciated, one fact remain that all the respondent workmen were appointed as daily wager simpliciter; they were not appointed in any specific

project/work. Admittedly, no such agreement or specific contract of service between the petitioner and the respondent workmen has been executed; no such appointment orders to that effect were issued by the petitioner. In absence of such facts, it cannot be said that the workmen were appointed for the project work as alleged as they were simply appointed as daily wager. No specific terms or orders to that effect have been produced by the petitioner either before the labour court, Surat or before this Court. It is not in dispute that all the respondent workmen have proved two facts before the Labour Court, Surat that they remained in service for more than one year continuously and completed 240 days continuous service. The petitioner has not disproved these facts before the labour court. Therefore, at the time of termination, procedure as required under section 25-F and 25-H admittedly not followed by the petitioner. When the mandatory provisions have not been followed by the petitioner, then, termination order become void ab initio and the workmen are deemed to be in continuous service with the petitioner. That view has been taken by the Hon'ble Apex Court in case of Mohan Lal versus The Mmanagement of M/s. Bharat Electronics Ltd. reported in AIR 1981 SC 1253. Relevant observations made by the Hon'ble Apex Court in para 17 of the said judgment are reproduced as under:

> 17. The last submission was that looking to the record of The last submission was that looking to the record of the appellant this Court should not grant reinstatement but award compensation. If the termination of service is ab initio void and inoperative, there is no question of granting reinstatement because there is no cessation of service and a mere declaration follows that he continues to be in service with all consequential benefits. Undoubtedly, in some decisions of this Court such as Ruby General Insurance Co. Ltd v. Chopra (P.P.), and Hindustan Steel Ltd. Rourkela v. A. K. Roy and Others it was held that the Court before granting reinstatement must weigh all the facts and exercise discretion properly whether to grant reinstatement or to award compensation. But there is a catena of decisions which rule that where the termination is illegal especially where there is an ineffective order of retrenchment, there is neither termination nor cessation of service and a declaration follows that the workman concerned continues to be in service with all consequential benefits. No case is made out

for departure from this normally accepted approach of the Courts in the field of social justice and we do not propose to depart in this case."

Therefore, in view of the aforesaid observations made by the Hon'ble Apex Court in case of Mohan Lal (supra), the workmen are entitled for the normal relief of reinstatement. The departure from normal rule has not been pointed out and proved by the petitioner before the labour court, Surat as subsequently 450 workmen were appointed as admitted by the witness for the petitioner and his advocate Shri Soni before the Labour Court, Surat. Therefore, the decisions relied upon by Mr. Oza are not helpful to the petitioner and the submission that the daily wager cannot be reinstated in service cannot be accepted in the facts of the present case. In view of these facts and circumstances of the case, I am of the opinion that the Labour Court, Surat was right in granting relief in favour of the respondent workmen without any burden upon the petitioner.

Recently, in case of S.M. Nilajkar & Others v. Telecom District Manager, Karnataka reported in 2003 (3) SCALE page 533, decided on 31.3.2003 where the question of project employees was involved in the mater and the retrenchment and delay in raising the dispute has been examined. relevant observations made in para 11,12,13, 14 and 18 to 20 which are applicable to the facts of the present case are reproduced as under:

"11. It is common knowledge that the Government as a welfare state floats several schemes and projects generating employment opportunities, though they are short lived. The objective is to meet the need of the projects is that for the duration they exist, they provide employment and livelihood to such persons as would not have been able to secure the same but for such schemes or projects. If the workmen employed for fulfilling the need of such passing phase projects or schemes were to become a liability on the employer State by too liberally interpreting the labour laws in favour of the workmen, then, the same may well act as a disincentive to the State for floating such schemes and the State may opt to keep away from initiating such schemes and projects even in times of dire need, because it may feel that by opening the gates of welfare it would be letting

in onerous obligations entailed upon it by extended application of the labour laws. Sub clause (bb) in the definition of retrenchment was introduced to take care of such like situations by Industrial Disputes (Amendment) Act, 1984 with effect from 18.8.1984.

12. Retrenchment in its ordinary connotation is discharge of labour as surplus though the business or work itself is continued. It is well settled by a catena of decisions that labour laws being beneficial pieces of legislation are to be interpreted in favour of the beneficiaries in case of doubt or where it is possible to take two view of a provision. It is also well settled that the Parliament has employed the expression 'the termination by the employer of the service of a workman for any reason whatsoever' while defining the term 'retrenchment', which is suggestive of the legislative intent to assign the term 'retrenchment' a meaning wider than what it is understood to have in common parlance. There are four exceptions carved out of the artificially extended meaning of the term 'retrenchment', and, therefore, termination of service of a workman so long as it is attributable to the act of the employer would fall within the meaning of 'retrenchment' de hors the reason for termination. To be excepted from within the meaning of 'retrenchment' the termination of service must fall within one of the four excepted categories. A termination of service which does not fall within the categories (a), (b), (bb) and (c) would fall within the meaning of 'retrenchment'.

13. The termination of service of a workman engaged in a scheme or project may not amount to retrenchment within the meaning of sub-clause (bb) subject to the following conditions being satisfied

(i) that the workman was employed in a project or scheme of temporary duration;

(ii) the employment was on a contract, and not as a daily wager simplicitor, which provided inter alia that the employment shall come to an end on the expiry of the scheme or project;

(iii) the employment came to an end

simultaneously with the termination of the scheme or project and consistently with the terms of the contract.

(iv) the workman ought to have been apprised or made aware of the abovesaid terms by the employer at the commencement of employment.

14. The engagement of a workman as a daily wager does not by itself amount to putting the workman on notice that he was being envisaged in a scheme or project which was to last only for a particular length of time or upto the occurrence of some event, and, therefore, the workman ought to know that his employment was short lived. The contract of employment consciously entered into by the workman with the employer would result ina notice to the workman on the date of the commencement of the employment itself that his employment was short lived and as per the terms of the contract, the same was liable to termination on the expiry of the contract and the scheme or project coming to an end. The workman may not therefore complain that by the act of employer his employment was coming to an abrupt termination. To exclude the termination of a scheme or project employee from the definition of retrenchment it is for the employer to prove the abovesaid ingredients so as to attract the applicability of sub clause (bb) abovesaid. In the case at hand, the respondent employer has failed in alleging and proving the ingredients of sub clause (bb), as stated hereinabove. All that has been proved is that the appellants were engaged as casual workers or daily wagers in a project. For want of proof attracting applicability of sub clause (bb), it has to be held that the termination of the services of the appellants amounted to retrenchment.

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17. xxx

18. The fact remains that there was delay, thought not a fatal one, in initiating proceedings calculating the time between the date of termination and initiation of proceedings before the Industrial Tribunal cum Labour Court. The employee cannot be blamed for the delay. he learned Single Judge has denied the relief of

back wages while directing the appellants to be reinstated. That appears to be a just and reasonable order. Moreover, the judgment of the learned Single Judge was not put in issue by the appellants by filing an appeal.

19. For all the foregoing reasons we are of the opinion that the decision of the Division Bench deserves to be set aside and that of the learned Single Judge restored, except for the finding that the appellants were not project employees.

20. During the course of hearing it was stated at the Bar that there are a number of matters pending in different fora, Industrial cum Labour Court or High Court, raising similar issues awaiting decision in this case. We clarify that all such pending cases shall be heard and decided in accordance with the law as stated hereinabove. The project in which the workmen were engaged has come to an end. The respondent Government may consider the appellants being accommodated in some other project or scheme or regular employment, if available, by issuing suitable instructions or guidelines. If it be not possible, respondent shall be at liberty to terminate the employment of the appellants after reinstating them as directed by the High Court and then complying with section 25F of the Industrial Disputes Act."

In view of the above observations and in view of the facts of the present case, the respondents workmen were not the project employees. No such contract or appointment or any agreement by the petitioner with the workmen to that effect has been brought on the record before the Labour Court or before this Court in these petitions. It can, therefore, not be said that the respondents workmen were the project employees as contended by the learned GP Mr. Oza. They were simply appointed and engaged as a daily wager. Therefore, the contentions raised by the learned Government Pleader in that regard are rejected. Their termination was violative of the mandatory provisions of section 25F and 25H of the Industrial Disputes Act and as such, void ab initio. The delay in raising of an industrial dispute has been satisfactorily explained by the workmen before the conciliation officer and was condoned by the conciliation officer and the Labour Court which is not fatal. The labour court, Surat was right in granting

relief of reinstatement alone without continuity of service and back wages for the intervening period after taking into consideration the delay.

As regards direction (3) in the impugned award passed by the labour court in this group of petitions, learned GP Mr. Oza has submitted that the petitioner would be required to appoint the respondents against the permanent regular and vacant posts in the cadre. However, I am of the view that this is nothing but mere apprehension which too is not well founded because the directions issued by the labour court have to be read together as a whole and not in isolation. When the labour court has not granted any continuity of service, back wages for the intervened period, and has granted mere fresh employment as a daily wager to the respondents and when it has directed the petitioner to employ the respondents as per their seniority as and when the work is available, that would mean that there is no any direction requiring the petitioner to appoint them against any sanctioned post of the cadre and, therefore, if all the directions are read together, it would become clear that the apprehension voiced by the learned GP Mr. Oza is not well founded. Therefore, the contention raised by Mr. Oza in that regard is also rejected.

I have perused entire awards made by the labour court. According to my opinion, the awards of the labour court are based on the documentary and oral evidence on record. The awards made by the labour court is supported by the reasons which are quite cogent and convincing. The findings given by the labour court are the findings of fact which are not baseless and perverse. Learned Government Pleader Mr. Oza has not been able to point out any infirmity in the award. He has also not been able to point out any procedural irregularity committed by the labour court. He has also not been able to point out any jurisdictional error committed by the labour court and, therefore, I am of the view that the awards in question does not require any interference of this court in exercise of the powers under Article 227 of the Constitution of India.

The view taken by the Apex Court in Indian Overseas Bank v. I.O.B. Staff Canteen Workers' Union and Another reported in 2000 SCC [Labour and Service] pg.471, the Apex Court has held that while exercising the powers under Article 226 and 227 of the Constitution, interference with pure finding of fact and Reappreciation of the evidence is held to be impermissible. The High Court does not exercise appellate jurisdiction under

Article 226. Even insufficiency of evidence or that another view is possible, it is held that no ground to interfere with the findings of the Industrial Tribunal. Recently also, the Apex Court has considered this aspect in case of SUGARBAI M. SIDDIQ AND OTHERS V. RAMESH S. HANKARE reported in 2001 [8] SCC pg.477, the Apex Court has held that scope of powers of High Court is concerned not with the decision of the lower court / tribunal but with its decision-making process. High Court must ascertain whether such Court or tribunal had jurisdiction to deal with a particular matter and whether the order in question is vitiated by procedural irregularity, then only High Court can interfere with, otherwise, not.

Recently also, the Apex Court has considered the scope of Article 226 and 227 of the Constitution of India in case of OUSEPH MATHAI AND OTHER V. M. ABDUL KHADIR reported in 2002 [1] SCC 319. The relevant observations in para 4 & 5 are quoted as under :-

"4. It is not denied that the powers conferred upon the High Court under Articles 226 and 227 of the Constitution are extraordinary and discretionary powers as distinguished from ordinary statutory powers. No doubt Article 227 confers a right of superintendence over all courts and tribunals throughout the territories in relation to which it exercises the jurisdiction but no corresponding right is conferred upon a litigant to invoke the jurisdiction under the said article as a matter of right. In fact power under this article casts a duty upon the High Court to keep the inferior courts and tribunals within the limits of their authority and that they do not cross the limits, ensuring the performance of duties by such courts and tribunals in accordance with law conferring powers within the ambit of the enactments creating such courts and tribunals. Only wrong decisions may not be a ground for the exercise of jurisdiction under this article unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate courts and tribunals resulting in grave injustice to any party.

5. In Warayam Singh v. Amarnath this Court held that power of superintendence conferred by Article 227 is to be exercised more sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their

authority and not for correcting mere errors. This position of law was reiterated in Nagendra Nath Bora v. Commr. of Hills Division & Appeals. In Babhutmal Raichand Oswal v. Laxmibai Tarte this Court held that the High Court could not, in the guise of exercising its jurisdiction under Article 227 convert itself into a court of appeal when the legislature has not conferred a right of appeal. After referring to the judgment of Lord Denning in R. V. Northumberland Compensation Appeal Tribunal, ex p Shaw [All ER at p.128] This Court in Chadavarkar Sita Ratna Rao v. Ashalata S. Guram held : [SCC pg.460, para 20]

"20. It is true that in exercise of jurisdiction under Article 227 of the Constitution the High Court could go into the question of facts or look into the evidence if justice so requires it, if there is any misdirection in law or a view of the fact taken in the teeth of preponderance of evidence. But the High Court should decline to exercise its jurisdiction under Articles 226 and 227 of the Constitution look into the fact in the absence of clear and cut down reasons where the question depends upon the appreciation of evidence. The High Court also should not interfere with a findings are perverse and not based on any material evidence or it resulted in manifest injustice [see Trimbak Gangadhar Telang]. Except to the limited extent indicated above, the High Court has no jurisdiction. In our opinion therefore, in the facts and circumstances of this case on the question that the High Court has sought to interfere, it is manifest that the High Court has gone into questions which depended upon appreciation of evidence and indeed the very fact that the learned trial Judge came to one conclusion and the Appellate Bench came to another conclusion is indiction of the position that two views were possible in this case. In preferring one view to another of factual appreciation of evidence, the High Court transgressed its limit of jurisdiction under Article 227 of the Constitution. On the first point, therefore, the High Court was in error."

Recently also, the Apex Court has considered the scope of Article 226 and 227 of the Constitution in case of ROSHAN DEEN VS. PREETILAL reported in [2002] 1 SCC

Pg.100. Relevant observations in para-12 are quoted as under :-

"12. We are greatly disturbed by the insensitivity reflected in the impugned judgment rendered by the learned Single Judge in a case where judicial mind would be tempted to utilize all possible legal measure to impart justice to a man mutilated so outrageously by his cruel destiny. The High Court non suited him in exercise of a supervisory and extraordinary jurisdiction envisaged under Article 227 of the Constitution. Time and again this Court has reminded that the power conferred on the High Court under Article 226 and 227 of the Constitution is to advance justice and not to thwart it [vide State of U.P. v. District Judge, Unnao]. The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The look out of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-product of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law."

Recently also, the Apex Court has examined this question in reported decision in the case of ESSEN DEINKI V. RAJIV KUMAR, 2003 SC Labour & Service page 13. Relevant paragraphs are as under:

2. Generally speaking, exercise of jurisdiction under Article 227 of the Constitution is limited and restrictive in nature. It is so exercised in the normal circumstances for want of jurisdiction, errors of law, perverse findings and gross violation of natural justice, to name a few. It is merely a revisional jurisdiction and does not confer an unlimited authority or prerogative to correct all orders or even wrong decisions made within the limits of the jurisdiction of the courts below. The finding of fact being within the domain of the inferior tribunal, except where it is a perverse recording thereof or not based on any material whatsoever resulting in manifest injustice, interference under the article is not

called for.

3. The observations above, however, find affirmance in the decision of this Court in Nibaran Chandra Bag V. Mahendra Nath Ghughu. In Nibaran this Court has been rather categorical in recording that the jurisdiction so conferred is by no means appellate in nature for correcting errors in the decision of the subordinate courts or tribunals but is merely a power of superintendence to be used to keep them within the bounds of their authority. More recently, in Mani Nariman Daruwala Vs. Phiroz N.Bhatena this Court in a similar vein stated: (SCC pp. 149-50, para 18)

"In the exercise of this jurisdiction the High Court can set aside or ignore the findings of fact of an inferior court or tribunal if there was no evidence to justify such a conclusion and if no reasonable person could possibly have come to the conclusion which the court or tribunal who (sic) has come or in other words it is a finding which was perverse in law. Except to the limited extent indicated above the High Court has no jurisdiction to interfere with the findings of fact."

4. Needless to record that there is total unanimity of judicial precedents on the score that error must be that of law and patently on record committed by the interior tribunal so as to warrant intervention - it ought not to act as a court of appeal and there is no dissension or even a contra-note being sounded at any point of time till date. Incidentally, the illegality, if there be any, in an order of an inferior tribunal, it would however be a plain exercise of jurisdiction under the article to correct the same as otherwise the law courts would fail to subserve the needs of the society since illegality cannot even be countenanced under any circumstances.

5. In this context reference may also be made to a still later decision of this Court in the case of Savita Chemicals (P) Ltd. Vs. Dyes & chemical Workers' Union wherein this Court in para 19 of the Report observed: (SCC p. 166)

"Under Article 227 of the Constitution of

India, the High Court could not have set aside any finding reached by the lower authorities where two views were possible and unless those findings were found to be patently bad and suffering from clear errors of law."

The observations made by the Bombay High Court has, in case of Standard Chartered Grindlays Bank Ltd. and Govind Phopale and another reported in [2003 (96) FLR 145], para 17, 18(iv) and 23 and 24 are relevant in the facts and circumstances of the case. They are, therefore, reproduced as under:

"17. I need not stress the fact that wages is the real content of the Article 21. If we were to take out the wage content from this Article 21, it would be reduced to a dead letter not worth even for a decoration. In the absence of the source of livelihood which is protected by Article 21, the other fundamental rights would sound hollow and empty words and would collapse in no time as a dilapidated house. The workman and his family should not be made to stare merely on the pretext that proceedings under section 33(2)(b) for approval of the action taken by employer is pending though he is told by law that the jural relationship continues and he still carries the label that he is an employee of the applicant employer before the Tribunal. This jural sense of employment must put bread in his empty belly. He cannot be denied the wage content of his jural relationship by drawing a fine distinction of law point that he has factually ceased to be in employment as the employer has already passed an order of dismissal/discharge though he still continues to be in the employment of the employer in law. In the case of Fakirbhai, [1986 (52) FLR 688 (SC)], the Supreme Court was very much conscious of the delay in disposal of discharge/dismissal matters where the workmen concerned needed relief very badly. The Supreme Court has, therefore, considering the crucial aspect of the delay has given a great solace to the working class whose fate is covered under section 33 of the Act as a whole not to be sub divided by the sub sections.

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(iv) Consumer Education and Research Centre and otehrs v. Union of India and others, [1996 (72) FLR 479 = 1996 (2) LLN 1] in

para 22 and 24 at page 18zzzzz;

'22. The jurisprudence of personhood or philosophy of the right to life envisaged under Article 21, enlarges its sweep to encompass human personality in its full blossom with invigorated health which is a wealth to the workman to earn his livelihood to sustain the dignity of person and to live a life with dignity and equality.

24. The expression 'life' assured in Article 21 does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure."

In view of the above observations made by the apex court, I am of the view that unless and until it is successfully established that the labour court has committed any procedural irregularity in passing the award or that the findings recorded by the labour court are perverse and contrary to the evidence on record or that such findings are perverse, this court cannot disturb the same in exercise of the powers under Article 227 of the Constitution of India. The labour court was right in issuing the directions to the petitioner for re-engaging the respondents after appreciating the evidence on record. There is no financial burden upon the petitioner if the awards in question are implemented by the irrigation department of the petitioner State and the irrigation department of the petitioner is required often to undertake the new project or new activities and on such occasion, the petitioner has to offer the work to the present respondents in order of their seniority after preparing their seniority list as directed by the labour court. It is really a justice done by the labour court in favour of the respondents workmen who are out of job since more than 20 years who are illiterate and scheduled tribe persons and, therefore, according to my opinion, the labour court has not committed any error in passing the impugned awards. Entire awards made by the labour court are based on the appreciation of the evidence on record, both documentary and oral and, therefore, such findings of fact recorded by the labour court after appreciating the evidence on record cannot be reappreciated by this court in these petitions under

Article 227 of the Constitution of India.

For the reasons recorded above, there is no substance in this group of petitions and the same are required to be dismissed. Hence all these petitions are dismissed.

Dt.9.4.2003. (H.K. Rathod,J.)

Vyas